A

DIGESTED INDEX

TO THE

REPORTS OF ALL THE CASES

ARGUED AND DETERMINED

IN THE

Court of King's-Bench,

FROM MICHAELMAS TERM, 1821, TO MICHAELMAS TERM, 1823:

IN THE

Court of Common Pleas,

FROM MICHAELMAS TERM, 1821, TO TRINITY TERM, 1823:

IN THE

Court of Exchequer,

FROM HILARY TERM, 1820, TO TRINITY TERM, 1821:

AND IN THE DIFFERENT COURTS AT

Nisi Prius,

FROM MICHAELMAS TERM, 1820, TO MICHAELMAS TERM, 1823:

WITH REFERENCES,

TABLES OF TITLES, STATUTES, RULES AND ORDERS, AND NAMES OF CASES.

By JOHN BAYLY MOORE, Esq.

OF THE INNER TEMPLE.

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ADVERTISEMENT.

IT was the intention of the Editor, at the commencement of the last year, to have published a Digest to the Cases that were decided in 1822, as a continuation of the Supplement to his original undertaking, but unforeseen and unavoidable circumstances prevented him from so doing; and it has caused him considerable regret, that so long a period has elapsed before he has been enabled to lay the following pages before the Profession to which he has the honour to belong, and to every branch of which he is so much indebted for kindness and attention. He begs to state, that no pains have been spared to render this Index worthy their notice, as far as fidelity and accuracy of reference are requisite; and it contains an abstract of every case that has been reported from the day of the publication of the Supplement, to the commencement of the last *Hilary* Term.

1, INNER TEMPLE LANE,
Trinity Vacation, 1824.

A

TABLE

OF ALL THE

TITLES, DIVISIONS, SUB-DIVISIONS, AND REFERENCES

CONTAINED IN

This Digest.

NOTE.—Every principal Head or Title is printed in CAPITALS; the Divisions in SMALL CAPITALS; the Inferior Titles, from which References are made, in Roman Characters; and the References in *Italics*.

COSTS.

COUNTY RATE AND TREASURER - - - 91

COVENANT.

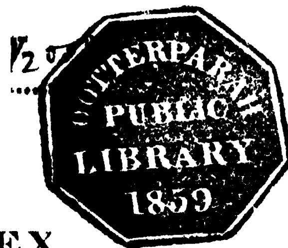
PRISONER.

AN

ANALYTICAL

DIGESTED INDEX,

&c.



ABATEMENT.

ABATEMENT, PLEAS IN.

I. TO THE PERSON.

(a) *Nonjoinder.*

See *Lanchester* v. *Tricker*, 1 Bing. 201. Post. page 3.

1. In an action on the case against the proprietor of a coach as a common carrier, for not safely conveying a passenger, he cannot plead in abatement the *nonjoinder* of a co-proprietor. *Ansell* v. *Waterhouse*, 2 Chit. 1.
See also *Beale* v. *Bird*, 2 Dow. & Ryl. 419.

2. Where a member of a country bank signed promissory notes for himself and partners, beginning with the words, "*I promise to pay*," &c.: Held that he made himself severally liable to be sued upon such notes, and could not plead in abatement a joint liability with his co-partners. *Hall* v. *Smith*, 2 Dow. & Ryl. 584. S. C. 1 B. & C. 407.

II. TIME OF PLEADING AND FILING.

1. The defendant having been arrested by a wrong christian name, informed the plaintiff's attorney of the error; and afterwards, before the declaration was delivered, pleaded in abatement. On the following day, the plaintiff declared in the defendant's right name; and the latter having omitted to plead *de novo*, the plaintiff signed judgment as for want of a plea: Held, that such judgment was regular. *Douglas* v. *Green*, 2 Chit. 7.

2. Pleas in abatement cannot be filed before the defendant has appeared, there being no distinction in this respect between pleas in abatement and pleas in bar; and therefore judgment may be signed for want of a plea, though a plea in abatement has been filed, if the defendant has not appeared. *Wakefield* v. *Marden*, 2 Chit. 8.

III. FORM AND REQUISITES OF.

See AMENDMENT III. 11, Post. page 13.

1. In proceeding by bill in the *King's Bench*, a plea in abatement, concluding with a prayer that the *declaration* be quashed, is bad. *Moffatt* v. *Van Millingen*, 2 Chit. 539. S. C. 2 B. & P. 124. *n.*

IV. AFFIDAVIT IN SUPPORT OF.

1. Where a defendant pleads in abatement, he must be prepared to prove his plea promptly; and a strong case must be made out before the Court will postpone the trial, in order to enable him to procure the testimony of witnesses. *Wade* v. *Birmingham*, 2 Chit. 5.

V. WHEN QUASHED.

1. Where the defendant was indicted with an *alias dictus*, and pleaded in

abatement that he was not known by such name: Held, that the plea must be demurred to, or issue taken thereon; and that it could not be quashed on motion. *Rex* v. *Clark*, alias *Jones*, 1 Dow. & Ryl. 43.

ACCORD AND SATISFACTION.

1. A plea to an action of *indebitatus assumpsit* for tithes bargained and sold, of payment of the debt and satisfaction of the "promises and undertakings" in the declaration mentioned, and an acceptance and receipt by the plaintiff of the debt in discharge of the said "promises and undertakings," is bad on demurrer, for not covering the costs and damages which had accrued to the plaintiff by reason of the non-performance of such promises. *Francis* v. *Crysell*,
1 Dow. & Ryl. 546.
S. C. Nomine Francis v. *Crywell*,
5 B. & A. 886.

2. So in an action of *assumpsit* on several promises, a plea to the whole declaration, that a pipe of wine was given in satisfaction of the cause of action, is bad on special demurrer. *Hopkinson* v. *Tahourdin*, 2 Chit. 303.
See also *Hoppe* v. *Symonds*, 2 Chit. 324.

3. To a declaration in *assumpsit* for use and occupation, the defendant pleaded "that after the making of the promises, and after the accruing of the causes of action mentioned in the declaration, and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff one ton weight of *Riga* hemp, and one hundred weight of *Russia* tallow, of the value of 30*l.* in full satisfaction and discharge of the promises in the declaration; and that the plaintiff had accepted the same of the defendant, in full satisfaction and discharge of such promises." On an affidavit that this plea was altogether false, the Court allowed the plaintiff to sign judgment as for want of a plea. *Richley* v. *Proone*,
2 Dow. & Ryl. 661.
S. C. 1 B. & C. 286.

ACCOUNT.

1. Two principal officers of the Court of *King's Bench* were appointed auditors, on motion, in an action of account, after judgment of *quod computet*. *Smith* v. *Smith*, 2 Chit. 10.

ACCOUNTANT GENERAL. See the Statute 1 *Geo.* 4. c. 35. & 8 Price 493.

ACTION.

I. JOINDER OF PARTIES.

See Post. tit. HUNDRED.

1. Where two persons contracted to assist the defendant with their respective horses, but to give in their accounts separately: Held to be separate contracts. *Smith* v. *Taylor*, 2 Chit. 142.

2. Where *A.* and *B.* being in partnership, *A.* signed an agreement on behalf of himself and *B.*, and *B.* survived *A.*: Held, that an action on the agreement lay against the executors of *B.* without joining those of *A.* *Calder* v. *Rutherford*, 3 Brod. & Bing. 302.

3. The payment of money to the defendant's use by a solvent partner, out of his separate property, after the bankruptcy of his partner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner. *Thacker* v. *Shepherd*, 2 Chit. 652.

4. Where several parishioners joined at a vestry meeting, in signing an order authorising two churchwardens to put a new roof on the parish tower, and both concurred in giving orders for that purpose, and one of them (the plaintiff) paid the artificers:—and a rate for reimbursing them having been quashed, the plaintiff sued the defendant, being the other churchwarden, for a moiety of the money so paid: Held, that the defendant could not insist on those parishioners who had signed the vestry order, being joined with him as co-defendants in the action. *Lanchester* v. *Tricker*, 1 Bing. 201.

5. In an action on the case for obstructing the plaintiff's lights, a clerk who superintended the erection of the building by which they were darkened, and who alone directed the workman, may be joined as a co-defendant with the original contractor. *Wilson* v. *Peto*, 6 Moore 47.

II. FORM OF.

(*a*) *Assumpsit or Tort.*

1. *A.* was let into the possession of a refuse spar, produced from a lead mine, situate in land demised to *B.*, a farmer, (as tenant from year to year), and paid an annual rent for the spar to *B.*'s landlord, and exercised dominion over it by disposing of it as his property; *C.* from time to time entered upon the land, and carried away portions of the spar, and *A.* brought an action of *assumpsit* for the value of the spar so taken away: After verdict by the jury, finding that *B.* the tenant of the land had an interest in the spar, and had not surrendered it to his landlord: Held, that the latter could not convey such a title to *A.* as would enable him (supposing his possession was clearly established) to waive the tortious taking and bring *assumpsit* for the value of the spar, in the absence of an express contract of sale, though the tenant had never disturbed his possession. *Lee* v. *Shore*, 2 Dow. & Ryl. 198. *S. C.* 1. B. & C. 94.

2. Two several firms, respectively carrying on the business of bankers in the same country town, were in the habit of changing notes and securities with each other, and settling their balances by a prescribed mode. One of the firms became bankrupt, and at the time of the act of bankruptcy each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprised of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly at the house of their agents in *London*, who did not know the situation in which the parties stood: Held, that the solvent firm might sue the provisional assignee for the amount of the notes in *assumpsit* for money had and received, though the conduct of the latter savoured of tort. *Edmeads* v. *Newman*, 2 Dow. & Ryl. 568. *S. C.* 1. B. & C. 418.

(*b*) *Case or Trespass.*

1. Where the plaintiffs, who were employed as contractors to complete a navigable canal, erected a dam composed of wood and earth, with the consent of the owner of the soil:—Held, that they might maintain trespass against the defendants as wrong doers for breaking and destroying the same, and that an action on the case would not lie. *Dyson* v. *Collick*, 1 Dow. & Ryl. 225. *S. C.* 5 B. &. A. 600.

2. Falsely, maliciously, and without any probable cause, procuring the warrant of a magistrate to search the premises and apprehend the person of *A.* on suspicion of felony, and thereby causing his premises to be searched, and his person imprisoned, is properly the subject of an action on the case, and not trespass. *Elsee* v. *Smith* (*in error*), 1 Dow. & Ryl. 97. *S. C.* 2 Chit. 304.

3. An action on the case is maintainable for an excessive distress for rent, though the tenant had tendered his rent to his landlord before the distress was levied. *Branscomb* (*Lady*) v. *Brydges*, 2 Dow. & Ryl. 256. *S. C.* 1 B. & C. 145.

III. JOINDER OF COUNTS.

1. A count stating "that the defendant had and received to the use of the plaintiff a certain sum of money, to wit, the sum of 10s. to be paid by the defendant to the plaintiff upon request, yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending to hurt, injure, and prejudice the plaintiff in that respect, had not, although often requested, paid the same; but on the contrary, converted and disposed thereof to his own use," is substantially laid in *assumpsit*, though apparently in trover, and cannot be joined with counts, in case for a fraud. But supposing it not a count in *assumpsit*, it is bad in form as well as substance as a count in trover, and is demurrable generally, though the demurrer goes only to that particular count. *Orton* v. *Butler*, 1 Dow. & Ryl. 282. *S C.* 5 B. & A. 652. 2 Chit. 343.

2. In general, the assignees of a bankrupt cannot lend; but as they may do so under circumstances, by the 5 *Geo.* 2, c. 30, s. 32, counts may be joined for debts due to the bankrupt, and for money lent by the assignees as such. *Richardson* v. *Griffin*, 2 Chit. 325.

3. A misjoinder of action against husband and wife may be taken advantage of on general demurrer. *May* v. *House*, 2 Chit. 697.

4. A demand against a surviving partner as survivor, may be joined with a demand due from him, as if he were solely liable. *Golding* v. *Vaughan*, 2 Chit. 436.

IV. NOTICE OF.

(*a*) *How framed.*

1. The notice of action, in case, against bricklayers, for negligence in repairing a public sewer, is not to be construed with the same strictness as is generally required in pleading, provided there is a sufficient cause of action shewn upon the face of it. Therefore, notice of action, under a local act requiring such notice, "that the defendants made, altered, repaired, cut, dug, worked, and enlarged the sewer in so negligent, incautious, unskilful, improvident, and improper a manner, that the plaintiff's premises fell, and were greatly damaged, weakened, and destroyed," is a sufficient notice to sustain the action, though the proof was, first, that the defendants had not propped and shored up the plaintiff's house in the progress of the work: and, secondly, that the immediate cause of the injury was the falling of other houses, which drew the plaintiff's after them. *Jones* v. *Bird*, 1 Dow. & Ryl. 497. *S. C.* 5 B. & A. 837.

2. But a notice, under an act of parliament, against a toll-gate keeper "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, entitled," &c. is too uncertain, and bad. *Freeman* v. *Line*, 2 Chit. 673.

(*b*) *To Magistrates.*

1. A magistrate is entitled to notice of action under the 24 *Geo.* 2, c. 44, s. 1, when he acts as a magistrate, though what he does is not strictly within the scope of his office. *Bird* v. *Gunston*, 2 Chit. 459.

2. So where he acts upon a subject matter of complaint, over which he has authority, but which arises out of his jurisdiction, he is entitled to the notice required by the above statute before the party aggrieved can bring an action. *Prestidge* v. *Woodman*, 2 Dow. & Ryl. 43. *S. C.* 1. B. & C. 12.

V. AGAINST EXCISE AND OTHER OFFICERS, WHEN TO BE COMMENCED.

See Post. tit. LIMITATIONS, STATUTE OF, *Crook* v. *M'Tavish*, 2 Bing. 167.

1. By the statute 23 *Geo.* 3, c. 70, s. 34, any action or suit against any person or persons, for any matter or thing done by any officer or officers of Excise, or any others acting in his or their aid, must be commenced within three months next after the cause of action. *Hendry* v. *Biers*, 2 Dow. & Ryl. 9.

2. It seems that this section extends to the officers themselves, and others acting in their aid: At all events, an action against officers of Excise, &c. not brought within the time limited, is barred by the 28 *Geo.* 3, c. 37, s. 23, which extends to any action against *any* person or persons for any thing by him or them done, in pursuance of any act or acts relating to the revenues of Customs and Excise. 2 Dow. & Ryl. 9.

VI. DEMAND OF PERUSAL AND COPY OF WARRANT.

See *Norton* v. *Miller*, 2 Chit. 140.

1. A constable who assists a parish officer in levying a distress for poor-rates, under a warrant of magistrates, directed to such officers, is not liable to an action of trespass, although a demand was duly made on such constable in pursuance of the statute 24 *Geo.* 2, c. 44, s. 6. *Clarke* v. *Davey*, 4 Moore 465.

2. Where constables were directed under a warrant to search for and take black kerseymere cloth, supposed to have been stolen, and they took cloths of a different description and colour, and carried them before a magistrate, refusing, at the time they took them, to inform the owner whether they acted under a warrant or not: Held, that they were within the protection of the statute 24 *Geo.* 2, c. 44, s. 8, and therefore that an action against them ought to have been commenced within six calendar months from the time of such taking; and it seems, that that section applies to all cases of constables acting as such. *Smith* v. *Wiltshire*, 5 Moore 322.

ACTION ON THE CASE.

I. TORTS TO PERSONS.

(a) *Malicious Arrest and Prosecution.*

1. A positive oath that a felony has been actually committed, is not necessary to justify a magistrate in granting his warrant to search the premises and apprehend the person of a party suspected of felony; and though it may be *trespass* in the magistrate to grant an illegal warrant, yet an action on the case may be supported against the person who causes and procures such warrant to issue, if it is done maliciously, and without reasonable or probable cause. *Elsee* v. *Smith (in error)*, 1 Dow. & Ryl. 97. *S. C.* 2 Chit. 304.

2. An action on the case lies for the malicious prosecution of a bad indictment for perjury. Therefore, where, in such action, the perjury was assigned upon evidence given before the sheriff's secondary on an inquisition of damages, where the writ of inquiry was directed to be returned into C. P. instead of K.B.: Held to be an objection in arrest of judgment. *Pippet* v. *Hearn*, 5 B. & A. 634. *S. C.* 1 Dow. & Ryl. 266.

(b) *Seducing Daughters.*

1. In order to maintain an action for seduction, the daughter must be the father's servant; and though he receives part of her wages, and she is under age, yet, if she is not his servant, he cannot maintain such action. *Carr* v. *Clarke*, 2 Chit. 260.

(c) *Negligence in driving Carriages.*

1. A master is liable for an accident in consequence of the chain-stay of a cart breaking, when the horse, being frightened, ran away and damage was done, as he is guilty of negligence in not having the tackle good. *Welsh* v. *Lawrence*, 2 Chit. 262.

2. In case for negligent driving, the law or usage of the road is not the criterion of negligence. Therefore, where the defendant's carriage was on the wrong side of the road, and in attempting to pass on the near, instead of the off-side, the plaintiff sustained damage: Held, that it was for the jury to decide the question of negligence, without regard to the law of the road. *Wayde* v. *Carr*, (*Lady*), 2 Dow. & Ryl. 255.

3. In an action on the case in the King's Bench, against two defendants, the plaintiff declared, that before and at the time of the grievances complained of they were proprietors of a stage-coach for the conveyance of passengers for hire, from *A.* to *B.*; and that being so, they received the plaintiff as an outside

passenger, to be safely conveyed thereon from *A.* to *B.* for hire to them in that behalf; and that by reason thereof, they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was overset; by means whereof the plaintiff was hurt and sustained other injuries. A jury having found a verdict against eight of the defendants only, and in favour of the other two, and judgment being entered accordingly:—Held, that as the action was founded upon a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber, in error. *Bretherton* v. *Wood (in error),* 6 Moore 141.
S. C. 3 Brod. & Bing. 54.

II. TORTS TO REAL PROPERTY CORPOREAL.

(*a*) *Not repairing Fences.*

1. A plea to a declaration against a tenant, for not using premises in an husbandlike manner, in repairing fences, &c. on his implied promise so to do:—that the fences became out of repair by natural decay, and that there was not proper wood (without specifying it), which the defendant had a right to cut for repairing the fences; and that the plaintiff ought to have set out proper wood for the purpose of repairs, which he neglected to do, without averring any request on the plaintiff so to do, or a custom of the country in this respect, is bad. *Whitfield* v. *Weedon,* 2 Chit. 685.

(*b*) *Misfeasance in performing Works.*

And see ATTORNEY, Post.

1. Where bricklayers, employed by Commissioners of Sewers to repair a public sewer, performed the work in such a manner as to occasion a damage to a neighbouring house: Held, that they were liable to an action on the case, though the work itself appeared to be performed in a skilful manner. *Jones* v. *Bird,* 1 Dow. & Ryl. 497.
S. C. 5 B. & A. 837.

2. *A.* an engineer, being employed by *B.* to erect a steam boiler and other apparatus on premises adjoining to the manufactury of *C*; and in consequence of the explosion of the boiler, from the insufficiency of the materials of which it was composed, the property of the latter was injured; and it being found as a fact by the jury, that *A.* was personally present, and that his servants had the management of the apparatus at the time of the accident: Held, that *C.* might maintain an action on the case against *A.* for the injury he had sustained. *Witte* v. *Hague,* 2 Dow. & Ryl. 33.

But it seems, that if the jury had negatived the fact of *A.*'s management of the apparatus, though the accident arose from an imperfection in the materials of which it was composed, he would not have been primarily liable.
2 Dow. & Ryl. 33.

And see *Wilson* v. *Peto,* 6 Moore 47.
Ante page 3.

ADDITION. See Post. tit. ESTOPPEL.
ADVOWSON. See Post. tits. { BOND. DEVISE.
ADMINISTRATOR. See ASSUMPSIT. EXECUTOR

AFFIDAVIT.

I. TO HOLD TO BAIL.

(*a*) *By whom made.*

1. It is no objection to an affidavit to hold to bail, that it is sworn by a deponent, a third person, who does not

shew himself to be in any way connected with the creditor, or to have any means of knowing of the existence of the debt. *Lee* v. *Sellwood*, 9 Price 322.

(*b*) *Form and Requisites of Contents as to Certainty.*

See Post tit. VARIANCE.

1. In an affidavit to hold to bail, the residence of a clerk may be described to be of the office in which he is employed. *Anonymous*, 2 Chit. 15.

2. An affidavit to hold to bail on an *Irish* judgment, must shew the value of *Irish* money. *Storie* v. *Ball*, 2 Chit. 16.

3. An affidavit to hold to bail, stating "that the defendant was indebted to the plaintiff in a certain sum, upon and by virtue of a certain charter-party of affreightment, bearing date, &c. for and on account of the hire of a certain ship called the *S*, let to hire by the plaintiff to the defendant, and by him taken for a certain voyage, from the port of *L.* to *P.*:" Held, that the allegation that the defendant was indebted for the hire of a ship in a sum which he had not paid, was sufficiently certain. *Skeen* v. *M'Gregor*, 1 Bing. 242.

4. An affidavit to hold to bail stating "that *E. I.* is justly and truly indebted to the affirmant in the sum of 33*l.*, being the amount due to the affirmant from the said *G. P. E. I.* for his subscription as member of a certain reading-club, according to the rules and regulations of the same," is bad in form as well as in substance. *Waters* v. *Joyce*, 1 Dow. & Ryl. 150.

5. An affidavit to hold to bail, stating "that the defendant was indebted to the plaintiff in the sum of 1000*l.* upon and by virtue of a certain memorandum in writing, bearing date, &c. and signed by the defendant, whereby he promised the plaintiff, that when he returned in the month of *March* or *April* then next, he would marry her, or pay her the sum of 1000*l.*" without shewing any mutual consideration on the part of the plaintiff to sustain the defendant's promise, is insufficient, as the Court can take nothing by intendment in an affidavit of debt. *Macpherson* v. *Lovie*, 2 Dow. & Ryl. 69. *S. C.* 1 B. & C. 108.

6. In such affidavit, it is a sufficient statement of the cause of action, that it is for the use and occupation of premises of the creditor, and if the statement proceed to say, "as tenant thereof," it is no objection that there was not added, "to the creditor." *Lee* v. *Sellwood*, 9 Price 322.

7. A defendant having guaranteed to the plaintiff the payment of money for goods to be sold and delivered to another person, and undertaken to pay for them, if he should fail to do so to the extent of a sum certain, may be arrested and held to bail for the amount of goods sold and delivered within that sum, on the common affidavit. *Cope* v. *Joseph*, 9 Price 155.

8. An affidavit of debt for money lent, and for goods sold and delivered, and for work and labour done, is irregular if it omit to state that it was "at the instance and request of the defendant;" although it stated that it was "to and for his use, and on his behalf." *Durnford* v. *Messiter*, 5 M. & S. 446.

9. Where an affidavit of debt stated "that *B.* owed to *A.* so much money, laid out and expended, and upon the balance of accounts," it was held insufficient. *Eicke* v. *Evans*, 2 Chit. 15.

10. An affidavit to hold to bail by the plaintiff, stating "that the defendant was indebted to him in a certain sum as indorsee of bills of exchange, drawn by *E. F.* upon and accepted by the defendant, payable to the order of the said *E. F.* at a day then past, and indorsed to the plaintiff," is sufficient, without farther shewing the relation between the plaintiff and defendant. *Lamb* v. *Newcombe*, 5 Moore 14.

11. So an affidavit, stating "that the defendant was indebted to the plaintiff in a certain sum as indorsee of a bill drawn by *E. F.* upon and accepted by the defendant, payable to the order of *E. F.* at a day then past," is equally sufficient and certain. *Lamb* v. *Edwards*, 5 Moore 14.

12. And an affidavit made by *J. S.* "that the defendant was indebted to the plaintiff in a certain sum, as the acceptor of a bill of exchange, bearing date on a certain day, drawn by the plaintiff on and accepted by the defendant, payable two months after the date thereof, and due at a day now past," is sufficient, without farther shewing the relation between the plaintiff and defendant, or adding that the bill remained unpaid. *Warmsley* v. *Macey*, 5 Moore 52.

13. An affidavit stating "that *W. C.* is justly and truly indebted to this deponent

in the sum of 44*l.* 11*s.* being the amount of a certain inland bill of exchange, drawn by the said *W. C.* on this deponent, and by him accepted for the honour of the said *W. C.*, payable to the order of the said *W. C.* at a day now past, and which said bill of exchange was paid by this deponent," discloses a sufficient cause of action to hold the defendant to bail. *Brooks* v. *Clark*, 2 Dow. & Ryl. 148.

(c) Negativing Tender.

1. An affidavit to hold to bail by an agent negativing tender of bank-notes, is sufficient, unless the defendant himself swears to a tender. *Allison* v. *Atkins*, 2 Chit. 18.

2. It is no objection that a deponent, a third person, who does not shew himself to be in any way connected with the creditor, or to have any means of knowing of the existence of the debt, swear positively that the debtor has not made any tender in bank- otes to the creditor, although he (the creditor) be living in *England:* and, if a defendant would avail himself of any defect in the denial of the tender by him to pay the debt in Bank of *England* notes, he must first put in an affidavit, stating that he has made such tender. *Lee* v. *Sellwood*, 9 Price 322.

(d) Supplemental or Counter.

1. The Court granted a rule *nisi* to discharge the defendant out of custody on filing common bail, where the debt sworn to was 600*l.* on the balance of an account, and a counter affidavit was made on the part of the defendant, that the account had been settled at a much smaller sum. *Jackson* v. *Tomkins*, 2 Chit. 20.

II. ON MOTIONS AND RULES.

(a) How entitled.

1. Affidavits in support of a rule to set aside proceedings by the assignee of a bail-bond, may be entitled in an action on it, or in the original cause. *Kelly* v. *Wrother*, 2 Chit. 109.

2. But in C. P. where the bail-bond had been regularly assigned by the sheriff: Held, that the affidavits must be entitled in the action on the bail-bond, and not in the original cause. *Ham* v. *Philcox*, 1 Bing. 142.

3. It is irregular, on moving for a rule *nisi* for a *certiorari*, to entitle the affidavits in any cause. *Ex-parte Nohro*, 1 B. & C. 267.

(b) Commissioners to take who shall be, and before whom sworn.

1. No commission for taking affidavits in the Court of *King's Bench* can be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the Courts at *Westminster;* and no such commission can issue without an affidavit, m: le by the person intended to be named therein, that he is not, and doth not intend to become a practising conveyancer; or that he is an attorney or solicitor, duly enrolled in one of the said Courts, and hath taken out his certificate for the current year. *Reg. Gen.* H.T. 3 & 4 *Geo.* 4. 2 Dow. & Ryl. 438. 1 B. & C. 288.

2. And attornies and solicitors duly enrolled, and practising in any of the Courts of Great Sessions in *Wales*, or in either of the Counties Pa'-tine of *Chester*, *Lancaster*, or *Durham*, must be comprised within the above rule of *Hilary* Term, 3 & 4 *Geo.* 4 in like manner as attornies or solicitors of the Courts of *Westminster*. *Reg. Gen.* E. T. 4 *Geo.* 4. 2 Dow. & Ryl. 870. 1 B. & C. 656.

3. An attorney, before whom an affidavit had been sworn in the country as a commissioner, and who had been the legal adviser of one of the deponents, and had in *London* told the party really interested in the cause for which the affidavit was sworn, that he intended to move the Court in that particular cause, in which, however, he was not the attorney: Held, that this formed no objection to the affidavit. *Williams* v. *Hockin*, 8 Taunt. 435.

(c) Form and Requisites of.

See *In re Gellebrand*, 1 Dow. & Ryl. 121.

1. Though affidavits have been used and a motion filed thereon, they may be again referred to in support of a fresh motion. *De Woolf* v. ———, 2 Chit. 14.

2. In shewing cause against a rule which had been previously before a Judge at chambers, the same affidavits cannot be used, unless they are re-sworn and re-stamped. *Chitty* v. *Bishop*, 4 Moore 413.

And see *Atkins* v. *Reynolds*, 2 Chit. 14.

Post. tit. STAMPS.

3. An affidavit that the defendant is advised and believes he has a good defence to the action, will not satisfy the condition of a rule which requires him to swear to a good defence "on the merits." *Pringle* v. *Marsack*, 1 Dow. & Ryl. 155.

4. Where there is a defect in the *jurat* of an affidavit on which to found a rule *nisi*, it cannot be used, nor will time be given except in cases of bail. *Anonymous*, 2 Chit. 20.

5. An erasure *over* the *jurat* does not vitiate it. *Atkinson* v. *Thomson*, 2 Chit. 19.

6. Where there are several deponents, their names must be inserted in the *jurat*. *Anonymous*, 2 Chit. 19.

7. So in the Court of Exchequer, the names of all the deponents must be written in the *jurat*, or the affidavit will not be received. *Reg. Gen.* T. T. 1 *Geo.* 4. 8 Price 501.

8. And affidavits made by illiterate persons must be certified to have been read to and understood by the deponents, in the presence of the officer of that Court, or person administering the oath. *Reg. Gen.* T. T. 1 *Geo.* 4. 8 Price 501.

9. And it must be so certified in the *jurat;* and that the deponent understood the affidavit, and signed it in the presence of the Commissioner taking the same. *Reg. Gen.* H. T. 40 *Geo.* 3. 8 Price 504.

10. Affidavits to be used on a special application, must be filed one clear day before such application is made: and where notice of motion is necessary, the filing of the affidavit must be mentioned at the foot of the notice. *Reg. Gen.* H. T. 1 & 2 *Geo.* 4. 9 Price 88.

11. No office copy of an affidavit can be received or read in that Court, unless it has been previously examined and signed by the attorney or clerk in Court making the same, or his accredited agent. *Reg. Gen.* E. T. 2 *Geo.* 4. 9 Price 298.

AGENT AND PRINCIPAL.

I. RIGHTS OF, WITH REFERENCE TO PRINCIPAL.

1. A plaintiff who has made a contract as agent for a third person, cannot sue as principal without giving notice to the defendant previously to the commencement of the action, that he is the party actually interested. *Bickerton* v. *Burrell*, 5 M. & S. 383.

2. Where an agent employed in endeavouring to carry a bill through Parliament for making a railway, sued the chairman of a Committee of Subscribers to the undertaking, for his work and labour, and expenses incurred as such agent, and it appeared that the agent was himself a subscriber to the undertaking: Held, that the action was not maintainable. *Holmes* v. *Higgins*, 2 Dow. & Ryl. 196. *S. C.* 1 B. & C. 74.

II. DUTIES AND RESPONSIBILITIES OF, IN REGARD TO PRINCIPAL.

1. A power of attorney authorising an agent to demand, sue for, recover, and receive, by all lawful ways and means, all monies, debts and dues whatsoever, and to give sufficient discharges, does not authorise him to indorse bills for his principal. *Murray* v. *East India Company*, 5 B. & A. 204.

2. The mere circumstance of a principal's drawing bills on his factor to whom goods were consigned, to be provided for out of the proceeds of such goods, does not authorise the factor to pledge them for the purpose of raising money to meet the bills. *Gill* v. *Kymer*, 5 Moore 503.

3. A contract, establishing between the contracting parties the relationship

of principal and agent, is made absolute in law by the latter's acting under it: and an insurance-broker cannot, as an agent, dispute the claim of his only known principal, on the ground that other persons were interested in the subject matter of the insurance:—their claims would be a question between the assured, and the persons so claiming to be interested. *Roberts* v. *Ogilby*, 9 Price 269.

4. *A.* an auctioneer, being employed to sell an estate belonging to *B.* entered into and signed an agreement with *C.* for the purchase, in his own name, as agent of *B.*, and *B.* shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of *A.'s* having signed the same on my behalf:" Held, that *A.* was not personally responsible. *Spittle* v. *Lavender*, 5 Moore 270.

5. *A.* consigned and shipped goods to *India* for sale; and in his letter of instructions to his agent *B.*, directed him to invest the proceeds in certain specified articles of merchandize, or *in bills at the exchange of the day*, and remit them to *England*. *B.*, instead of complying with this order, invested the proceeds in a commodity not specified in his letter of instructions, and informed *A.* of the purchase by letter, and transmitted a bill of lading for the goods, which reached *A.* on the 29th *May*, who notified to an agent of *B.* on the 7th *August*, his dissent from what had been done:—The goods having in the mean time been lost at sea: Held, that the laches of *A.*, in delaying his notice of dissent so long, discharged *B.'s* liability, and that the Jury were warranted in finding that *A.* had assented to the purchase made by *B.* *Prince* v. *Clark*, 2 Dow. & Ryl. 266. S. C. 1 B. & C. 186.

6. By the 47th *Geo.* 3, *sess.* 2, c. 28, s. 29, "All contracts for coals are to be fairly entered in a book to be kept by the factor and subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of such market." Where, therefore, a factor, having coals consigned to him for sale by *A.* sold the same, and entered the contract in his book as having been made for *C.*, the master of the ship by which they were sent, and such contract was not signed by the purchaser; but in the copy delivered to the clerk of the market the purchaser's name, as well as that of the factor, were inserted; and the latter had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. *Quære*, whether under these circumstances an action might be maintained in the name of *C.* for the price of the coals. *Hudson* v. *Granger*, 5 B. & A. 27.

III. OBLIGATION OF PRINCIPAL TO THIRD PERSONS FROM ACTS OF.

See Post. tit. DISTRESS.

1. The mere circumstance of a principal's drawing bills on his factor to whom goods were consigned, to be provided for out of the proceeds of such goods, does not authorize the factor to pledge them for the purpose of raising money to meet the bills.

Where, therefore, a factor became bankrupt, and the pawnee had afterwards sold the goods: Held, that the principal might recover as against him the whole of the proceeds of such sale, in an action for money had and received, although the factor had appropriated part of the money advanced by the pawnee, to the payment of one of the bills drawn by his principal. *Gill* v. *Kymer*, 5 Moore 503.

2. And where a foreign merchant consigned goods to his correspondent in *London*, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt: Held, that the factor was liable to the foreign merchant in trover for the goods. *Duclos* v. *Ryland*, 5 Moore 518. (*n.*)

3. Where *A.* and *B.* having agreed to purchase cottons on their joint account, directed their brokers to purchase the same, and purchases having been made, *East India* warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of *A.*, and immediately after the purchases *B.* paid *A.* one-half the value:—After considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased. *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers; as a security for which, the whole of the warrants were deposited

with *C.* by the brokers. While they were so deposited, the brokers received directions both from *A.* and *B.* to make a division of the goods held on their joint account; which they did, by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by *A.* to get one-half renewed, which *C.* agreed to do, and discounted fresh bills; and the brokers then left in the hands of *C.*, as a security for the money thus advanced, the warrants belonging to *B.*; *C.*, however, not then knowing that *B.* had any interest in them: Held, that the first pledge did not transfer to *C.* any interest in that part of the goods which belonged to *B.*; and that the second pledge was the pledge of a specific chattel belonging to *B.* which the brokers had no authority to make. *Barton* v. *Williams*, 5 B. & A. 395.

IV. PERSONAL RIGHTS AND LIABILITIES OF AGENT TO THIRD PERSONS.

1. Where a foreign merchant consigned goods to his correspondent in *London*, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt: Held, that the factor was liable to the foreign merchant in trover for the goods. *Duclos* v. *Ryland*, 5 Moore 518. (*n.*)

2. An agent to a country bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon *London*, drew it in his own name for the amount upon the firm in *London*, the two firms being the same: Held, that the agent was personally liable as drawer, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money. *Leadbitter* v. *Farrow*, 5 M. & S. 345.

3. Where an auctioneer delivered goods without receiving the price from the purchaser, Held that he was liable to the plaintiff (his employer,) for not giving an accurate account of the full produce of the goods. *Brown* v. *Staton*, 2 Chit. 353.

AGREEMENT.

See *Spittle* v. *Lavender*, 5 Moore 270. Ante, last page.
Doe d. Newby v. *Jackson*, 1 B. & C. 448. Post. tit. EJECTMENT.

CONSTRUCTION AND OPERATION OF.

1. *A.* being in partnership with *B.*, signed an agreement on behalf of the house of *A.* and *B.* *A.* died and *B.* survived him: Held, that an action on the agreement was well brought against the executors of *B.* *Calder* v. *Rutherford*, 3 Brod. & Bing. 302.

2. By a letter of credit, merchants in *London* agreed to accept at *ninety days'* sight the drafts of a merchant at *Demerara*, on receiving invoice bills of lading, &c. of certain colonial produce to be remitted; and added, that "on receiving these documents, and *no irregularity appearing*, they would accept his drafts *at the usual date*, to the extent of 30,000*l.*" In pursuance of this agreement, two several cargoes were remitted in different ships, and shortly afterwards the consignor drew a bill at *six months'* sight upon the credit of the cargoes remitted, and in the bill directed the same "*to be charged to account as advised*," without specifying to the account of which cargo it was to be placed, and the consignees refusing to accept: Held, that they were liable upon their agreement in damages for not accepting. *Laing* v. *Barclay*, 2 Dow & Ryl. 530. *S. C.* 1 B. & C. 398.

3. An agreement between two coach masters not to oppose each other, and charge the same prices, is legal. *Hearn* v. *Griffin*, 2 Chit. 407.

4. Contracts by which brewers bind publicans to deal with them are not to be favoured in law, as tending to prejudice the health of the subject. *Thornton* v. *Sherratt*. 8 Taunt. 529.

5. An executory agreement for a share of a vessel with a present interest therein, though the purchase-money is to be paid with interest at a future time, is void by the 26 *Geo.* 3, c. 60, s. 17, and 34 *Geo.* 3, c. 68, s. 14, unless it contain a recital of the certificate of the ship's registry. *Biddell* v. *Leeder*, 2 Dow. & Ryl. 499. *S. C.* 1 B. & C. 327.

6. The mere circumstance that an agreement contains a provision for its being made a rule of Court, will not of itself authorise the Court to order it to be done. *Steers* v. *Harrop*, 1 Bing. 133.

7. The Court will not compel the plaintiff to deliver to the defendant a copy of an agreement, in order to enable the latter to plead in abatement that the agreement was signed jointly by himself and others. *Beale* v. *Bird*, 2 Dow & Ryl. 419.

AMENDMENT.

I. IN WRITS.

1. A writ having a wrong return cannot be aided by a correct day being mentioned in the notice to appear. *Anonymous*, 2 Chit. 356.

2. Before a writ is returnable it may be altered and re-sealed as to the return day without being re-stamped, provided no Term intervene between the *teste* and the day on which it is ultimately made returnable. *Durdon* v. *Hammond*, 2 Dow & Ryl. 211. *S. C.* 1 B. & C. 111.

3. Where an attachment of privilege was made returnable after the *essoign* day, and before the *quarto die post*, instead of a day certain in full Term; the Court allowed it to be amended on payment of costs by the plaintiff, and those of the application by the defendant to set it aside. *Adams* v. *Luck*, 6 Moore 113. *S. C.* 3 Brod. & Bing. 25.

4. If the defendant's name is stated to be *John* in the writ, and *Joseph* in the notice to appear, it may be amended; and therefore a rule to set aside the proceedings for irregularity was refused. *Badgett* v. *Lee*, 2 Chit. 355.

5. A sheriff having returned a levy under a writ of *fieri facias*, cannot return to the *venditioni exponas* that he has sold the goods, but detains the money for another party, under a prior writ of execution; and the Court of Exchequer will not, after such a proceeding, give the sheriff leave to amend his return; and they discharged an order to shew cause why the sheriff should not be allowed to amend such return, as being made too late, with costs; and refused a motion made *instanter*, for an attachment against him, as premature. *Rowe* v. *Tapp*, 9 Price 317.

6. Where a sheriff returned to a *capias* which had been issued by the plaintiff against the defendant, who was already in custody and afterwards escaped, "I have taken the defendant, whose body remains in the prison of," &c., the Court refused to allow him to amend the return by striking it out and making another according to the fact. *Ibbotson* v. *Tindal*, 1 Bing. 156.

7. The return to a writ of inquiry, if defective, may be amended by the award of the writ entered on the roll, after the inquisition of damages has been taken; and consequently the defect in the return does not vitiate the proceedings, or affect the jurisdiction of the sheriff. *Pippet* v. *Hearn*, 1 Dow. & Ryl. 266.

8. An amendment is so little favoured in a writ of right, that after an amendment had been made under a Judge's order, the Court discharged the order. *Tooth* v. *Boddington*, 1 Bing. 208.

9. The Court will not direct in what manner Justices shall make their return to a *mandamus*; but if the return made be sufficient to raise the question intended to be agitated, the Court will, at the instance of the party interested, make a rule giving the Justices liberty to amend in the manner required, if they shall be so minded. *Rex* v. *Marriott*, 1 Dow. & Ryl. 166.

II. IN MATTERS RELATIVE TO BAIL.

See Post. tit. BAIL.

1. In bail by affidavit, time will not be given to amend a mistake in the *jurat*, occasioned by the error of the Commis-

sioner in the country, unless the defendant produces an affidavit of merits. *Burford* v. *Holloway*, 2 Dow. & Ryl. 362.

2. Where an affidavit to hold to bail named five defendants, and separate bailable process was issued against one, and a bail-piece taken, in which he alone was named; and afterwards serviceable process was issued against the other four, who were not named in the bailable process; and the declaration was against all the five; the Court permitted the plaintiff to amend the recognizance of bail, by inserting the names of the four defendants who had been at first omitted. *Christie* v. *Walker*, 1 Bing. 206.

III. IN DECLARATIONS AND SUBSEQUENT PLEADINGS.

1. The Court allowed a declaration to be amended after a nonsuit, where a fresh action would be otherwise barred by the statute of limitations. *Dartnall* v. *Howard*, 2 Chit. 28.

2. In an action for breach of promise of marriage, the declaration contained three counts; the first to marry on request, the second within a reasonable time, and the third generally. On a motion to amend the declaration, by inserting a new count to marry on a particular day, the Court of C. P. ordered the first count to be amended, by striking out the promise to marry on request, and introducing a particular day therein, although the declaration had been filed more than two Terms before the application was made; and they directed the costs of such application to abide the event of the cause. *Horston* v. *Shilliter*, 6 Moore 490.

3. In covenant for not repairing, if the covenant to repair contains an exception of "casualties by fire," it is fatal on *non est factum* to state it in the declaration as a general covenant to repair, omitting the exception; and that Court will not allow the plaintiff to amend on payment of the costs of the trial, but leave him to his remedy, by bringing a fresh action. *Brown* v. *Knill*, 5 Moore 164.

4. A plaintiff having been nonsuited at *Nisi Prius* on the ground of a variance between the contract set out, and that proved, the Court granted a new trial, with leave to amend the declaration generally on payment of costs, with liberty to the defendant to plead *de novo* or demur. *Williams* v. *Pratt*, 5 B. & A. 896.

5. The *nisi prius* roll was allowed to be amended by inserting a special title to a declaration, the defendant having appeared after he became of age, which was after the first day of Term. *Boys* v. *Edmeads*, 2 Chit. 22.

6. A plaintiff in ejectment was permitted to amend his declaration on payment of costs, by adding a new count on another demise, after three Terms had elapsed, and the roll had been made up and carried in. *Doe d. Beaumont* v. *Armitage*, 1 Dow. & Ryl. 173. S. C. 2 Chit. 302.

7. Where judgment in ejectment was signed sixty years ago, when the Court of Chancery granted an injunction to stay execution, and nothing appearing to have been done in the cause since, the Court of King's Bench refused to enlarge the term in the declaration, for the purpose of enabling a descendant of the original plaintiff to sue out a *scire facias*, in order to revive the judgment, and take out a writ of possession against the heir at law of the original defendant, unless it were quite clear that such amendment would work no injustice. *Bradney* v. *Hasselden*, 2 Dow. & Ryl. 227. S. C. 1 B. & C. 121.

8. The Court will not order a defendant to amend a plea in which issue has been joined, on a doubt suggested, whether the plea meets the declaration; but will give the plaintiff leave to withdraw the *similiter*, and demur. *Attwood* v. *Bonacich*, 1 Dow. & Ryl. 473.

9. If a defendant obtains leave to amend his pleadings on payment of costs, it does not seem necessary under the words "*usual terms*," that he should be prepared to go to trial at the ensuing Sittings after the then Term. *Edmonds* v. *Walter*, 2 Chit. 292.

10. After trial and verdict for the plaintiff, the defendant was allowed to amend his pleas, and have a new trial, on payment of costs. *Storer* v. *Gordon*, 2 Chit. 27.

11. The Court will not permit a plea in abatement to be amended; but will allow the plaintiff to withdraw a demurrer to such plea, and reply. *Atkinson* v. ———, (*Gent.*) 2 Chit. 5.

12. A plea *puis darrein continuance* of a release by one of the lessors of the plaintiff is bad on general demurrer, and the Court would not give leave to amend. *Doe d. Byne* v. *Brewer*, 2 Chit. 328.

IV. IN ORDERS OF NISI PRIUS AND REFERENCE.

1. The Court refused to amend an order of *nisi prius* according to the terms contained in a paper signed by the counsel at the trial; the intention of the parties appearing from their subsequent acts to have been in favour of the terms of such order. *Pearman* v. *Carter*, 2 Chit. 29.

2. If all matters in difference *in the cause* are agreed to be referred to an arbitrator, and the associate, by mistake, draws up the order of reference generally as to all matters in difference between the parties, it cannot be amended; but they must go down to another trial. *Rawtree* v. *King*, 5 Moore 167.

V. IN MOTIONS AND RULES.

The Court will not amend a rule for a new trial, by providing that the action shall not abate by the death of a party, where a surety has previously entered into a bond for payment of the damages and costs of the second trial. *Lopez* v. *De Tastet*, 8 Taunt. 712.

VI. IN RECORDS AND VERDICTS.

1. If, on an issue on *nul tiel* record, there is a variance between the record and declaration, the Court will permit an amendment, on payment of costs. *Doubleday* v. ———, 2 Chit. 27.

2. Where a plea was pleaded to the whole declaration, but the matter of the plea was in truth but an answer to part, and a verdict was obtained and judgment given for the plaintiff, and a writ of error brought,—the Court refused to allow the record to be amended, by inserting judgment by *nil dicit* to the part unanswered—on the ground that such amendment was unnecessary. *Paterson* v. *Everard*, 2 Chit. 30.

3. Upon error assigned of a misnomer of the Christian name of one of the plaintiffs below in the warrants of attorney, the Court of Exchequer Chamber held it to be immaterial; and allowed the transcript of the record to be amended before amendment in the Court below, where there had been no verdict and judgment entered in the *nisi prius* record and judgment-roll upon a plea of set-off. *De Tastet* v. *Rucker (in error)*, 6 Moore 135. *S. C.* 3 Brod. & Bing. 65.

4. Where the Jury, in an action of debt on the statute 2 and 3 *Edw.* 6, c. 13, which gives treble value for not setting out tithes, found damages which amounted only to the single value: Held, that the Court could not amend the *postea*, by entering the verdict for the treble value. *Sandford* v. *Porter*, 2 Chit. 351.

VII. IN JUDGMENTS.

1. A rule to shew cause at Chambers, why a judgment which had been entered up by mistake on a warrant of attorney (for a less sum than that secured by it) should not be amended,—will not be granted on the consent of an attorney who was employed by both parties, but there must be some other person authorised. *Anonymous*, 2 Chit. 24.

VIII. IN PENAL ACTIONS.

1. An amendment was allowed in a *qui tam* action, by correcting an error in the declaration in the description of the persons to whom part of the penalty was given, though the defendant had pleaded early enough for the plaintiff to have gone to trial at the assizes after an issuable Term, and had neglected to do so, as well as delayed in making up the issue till a subsequent Term. *Solomons* v. *Jenkins*, 2 Chit. 23.

2. In an action of debt, to recover penalties against a sheriff's officer for extortion, under the 32 *Geo.* 2, c. 28, the Court of C. P. will not allow the declaration to be amended by inserting new counts on the 23 *Hen.* 6, c. 9. *Wright* v. *Ager*, 5 Moore 330.

3. A record may be amended in a penal action by inserting a *similiter*, though the objection was taken at the trial. *Wright* v. *Horton*, 2 Chit. 25.

ANNUITY.

I. ACTION FOR, WHEN MAINTAINABLE.

1. An instrument reciting that it had been agreed to sell an annuity, secured upon property in possession of the grantor, but containing no words of present grant, cannot be sued upon in a Court of law, even though it were enrolled. *In re Locke*,
2 Dow. & Ryl. 603.

2. Debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that the grantor had a freehold in the premises out of which it was payable;—as it must be inferred that he had such an interest where nothing appears to the contrary. *Kelly* v. *Clubbe*,
6 Moore 335.

II. MEMORIAL.

(*a*) *Enrolment and Registry of.*

1. Where the plaintiff had assigned an interest in coal veins to the defendants, in consideration of an annuity for her life, and for the payment of which a bond was conditioned: Held, that such bond did not require enrolment, under the 53 *Geo.* 3, c. 141. *James* v. *James*, 5 Moore 479.

And see S. P. *Harrison* v. *Smitheringale*,
Id. 481.

2. An annuity-bond, given in consideration of the natural love and affection which a son bore towards his mother, and for making some provision for her support and maintenance, need not be registered, under the 17 *Geo.* 3, c. 26, although it appeared that the grantor sold her trade and the money arising therefrom, together with whatever money she possessed, to her son, for the purpose of establishing him in business. *Keats* v. *Hick*,
5 Moore 629.

(*b*) *Trusts and Interests of Parties, how stated.*

1. A surety who charges his estate in fee simple, of which he was seized in possession at the time of granting an annuity with the payment of it, and which estate was of greater annual value than the annuity, is a grantor within the meaning of the 13 *Geo.* 3, c. 26, s. 8, and therefore no memorial is requisite. *Darwin* v. *Lincoln*,
5 B. & A. 444.

2. By the 53 *Geo.* 3, c. 141, the memorial of an annuity must contain the description and places of residence of the witnesses to the annuity deed. *Darwin* v. *Lincoln*, 5 B. & A. 444.

3. For by the second section of that statute it is provided that the memorial of any deed, or other instrument for securing the payment of an annuity, must contain the names and places of residence of the witnesses:—Therefore where the subscribing witness to a warrant of attorney, given as a collateral security to secure an annuity, was described in the memorial as "*C. R. clerk to W. A. of Gt. M.-St. in the county of M.*:" Held, that the memorial in this respect was not a compliance with the statute, as *C. R.* did not reside, but only attended at the office at Gt. M.-St. at the time, and the warrant of attorney was set aside. *Smith* v. *Pritchard*, 1 Dow. & Ryl. 374.
S. C. 5 B. & A. 717.

But see the statute 3 *Geo.* 4, c. 92.

4. And by the sixth section of that statute, it is enacted, that within thirty days after the execution of every deed, &c. whereby any annuity or rent-charge shall, from and after the passing of the said act, be granted for life or lives, or for any term of years, or greater estate determinable on life or lives, the memorial of the date of every such deed, &c.—of the names of all the parties, and all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, shall be enrolled in Chancery, in the form or to the effect therein exemplified, with such alterations as the nature and circumstances of any particular case may reasonably require; and in a schedule the following directions are given as the mode of describing the witnesses in the memorial:—At the head of one of several columns, which are to contain the substance of the deeds, stand the words "names of witnesses;" and underneath, as applicable to indentures of lease and

release, the letters and words, "E. F. of ——— ; G. H. of ———;" and as applicable to a bond and warrant of attorney to confess judgment, the letters "E. F., G. H." Where the witnesses to the deeds for securing the payment of the annuity, were attorney's clerks: Held, that they were sufficiently described in the memorial as clerks to *E. H.* (their employer), of *B.* (the employer's residence). *St. John* v. *Champneys*, 1 Bing. 77.

5. Where the memorial of an annuity-deed described one of the subscribing witnesses to the warrant of attorney by the initial of his Christian name, instead of setting it out at length: Held not to be a compliance with the 53 *Geo.* 3, c. 141, s. 2; and the Court ordered the warrant of attorney for securing such annuity to be set aside. *Cheek* v. *Jefferies*, 3 Dow. and Ryl. 185. *S. C.* 2 B. & C. 1.

(*c*) *Securities, how described.*

1. Where an annuity was secured by bond and warrant of attorney, and by an indenture charging lands, which stated the annuity to be granted in consideration of 1050*l.* paid by the grantee to the grantor, on which was indorsed a receipt for the money from the grantee *by payment of T. H. his agent*, and the indenture also contained a proviso, that execution should not be taken out upon the warrant of attorney, until forty days after the day limited for the payment of the annuity; and the memorial set forth the bond with its date, and the indenture as *bearing even date therewith*, but omitted any mention of the proviso: Held, that the memorial sufficiently contained the date of the indenture, and need not have set forth the proviso; and that the receipt, coupled with the indenture, sufficiently described the person by whom the consideration was paid. *Doe d. Mason* v. *Phillips*, 5 M. & S. 369.

(*d*) *Consideration, how expressed.*

1. Where part of the consideration of an annuity consisted of a draft payable at a bankers: Held, that it was necessary to state in the memorial at what time such draft was payable; and the application for setting aside the securities being made twelve years after the execution of the deed, and after the deaths of the attesting witnesses, the Court of C. P. imposed on the grantors the terms of returning the principal, on taking an account before the Prothonotary. *Drake* v. *Rogers*, 4 Moore 402.

2. A fair and *bona-fide* sale of an interest in land, where the consideration in part or in whole is an annuity to be be paid to the vendor, the consideration for granting such annuity is not a pecuniary consideration or money's worth, within the meaning of the statute 53 *Geo* 3, c. 141. *James* v. *James*, 5 Moore 479.

And see *Harrison* v. *Smitheringale*, *Id.* 481.

3. An annuity-deed contained a covenant by the grantor that he would not at any time during the continuance of the annuity go upon the seas, or parts beyond them, without first giving the grantee seven days' notice in writing of such his intention, in order to enable him to pay such additional premiums of insurance as might be incurred on account thereof, which premiums the grantor covenanted to pay to the grantee: Held, that it was not necessary to state such covenant in the memorial under the statute 53 *Geo.* 3, c. 141. *Wood* v. *Perrott*, 5 Moore 63.

4. Where the grantor of an annuity assigned a policy of assurance on his own life to the grantee, whereby the latter was enabled to insure the life of the former, at a less premium than he otherwise might have done: Held, that such assignment was no part of the consideration, and need not have been set out in the memorial, under 53 *Geo.* 3, c. 141, s. 2. the other requisites of that statute having been complied with. *Morris* v. *Jones*, 3 Dow. & Ryl. 263.

III. WHEN AND HOW SET ASIDE.

1. On a motion to set aside an annuity after a lapse of eleven years, on the ground of a mistatement in the consideration, the affidavits should state that the parties are alive. *Amstead* v. *Atkins*, 2 Chit. 32.

2. Where an annuity is sought to be set aside on the ground of the insufficiency of the consideration, there must be an affidavit of the circumstances from the grantor himself. *Dartnall* v. *Wellesley* (*Marquis*), 3 Brod. & Bing. 255.

3. Where a judgment had been entered upon a warrant of attorney to secure an annuity, it was set aside because there was no memorial, though it it was omitted at the request of the

grantor; and the Court refused to take the warrant of attorney off the file. *Anonymous*, 2 Chit. 34.

4. It is discretionary with the Court, whether they will give relief under the fourth section of the Annuity Act, 17 *Geo.* 3, c. 26; and they may either vacate the securities given for an annuity in case of a violation of that clause, or do so on certain terms, or refuse to do so altogether, according to the circumstances of each particular case:— Where therefore, after the consideration of an annuity had been paid to the grantor, the latter immediately paid back to the grantee (who was in partnership as an attorney with two other persons) a sum for procuration-money, in pursuance of an agreement for that purpose, and there appeared to be no fraud or collusion: Held, that the deeds were not void by the fourth section of that statute, and that the Court might impose such terms upon the parties as seemed just and reasonable. *Girdlestone* v. *Allan*, 2 Dow. & Ryl. 150, 157. *S. C.* 1 B. & C. 61.

5. Where, upon the grant of an annuity, the agent of the grantees, on paying the consideration-money, retained a considerable sum for the expenses of preparing the deeds, and a further sum by way of advance to answer the first year's payment of the annuity; the Court of C. P. set aside the deeds against a person who was surety for the payment of the annuity by two collegians, who were minors at *Cambridge*;—on the ground that this was an illegal retainer; but they imposed on such trustee the terms of returning the principal with interest, on taking an account before the Prothonotary. *Meree* v. *Hammond*, 6 Moore 491.

6. That Court set aside the securities for an annuity after a lapse of six years, for two of which it had been paid, on the ground that the consideration-money did not belong to *W.*, as stated in the securities, but to *C.*; and that the name of the person on whose behalf the money was paid, was not truly set forth in the receipt thereon, C. being alive, and having claimed the consideration-money and the annuity as his own. *Williams* v. *Hockin*, 8 Taunt. 435.

7. An annuity being in arrear, and the rent of an estate on which it was secured being unpaid, the trustee of the estate, who had negotiated the annuity between the grantor and grantee, having advanced a sum to the latter in anticipation of the coming rents, and received from the grantee on such advance the commission which he usually received on annuity payments; the Court of C. P. set aside an execution, which (the rents proving insufficient) was afterwards issued for that sum in the name of the grantee, against one who as surety for the payment of the annuity, had given a warrant of attorney to confess judgment. *Williamson* v. *Goold*, 1 Bing. 171.

8. So that Court afterwards set aside an execution which the grantee had issued for the same sum against the grantor. *Carroll* v. *Goold*, 1 Bing. 190.

9. Where, upon the grant of an annuity, the agent of the grantee, on paying the consideration-money, retained, or caused to be returned to him, a considerable sum for the expenses of deeds, investigating title, journies, &c., (two witnesses brought from a considerable distance for the purpose of attesting the annuity-deed, having first retired); that Court held that this was an illegal retainer, for which the grantee was responsible, and on that ground set aside the annuity ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for, and was ignorant of such retainer. *Williamson* v. *Goold*, 1 Bing. 234.

APOTHECARY.

1. A bond by an apothecary, not to set up business within twenty miles of *A.*, is not illegal as being in restraint of trade. *Haywood* v. *Young*, 2 Chit. 407.

2. The statute 55 *Geo.* 3, c. 194, which was passed on the 12th *July*, 1815, does not extend to persons practising as apothecaries previously to the 1st *August* in that year. A person who practised as an apothecary, *previous to*, but not *on* the 1st *August*, without a certificate, was however, held to be liable to the penalties of that act. *Quære*, whe-

ther an infant can lawfully practise as an apothecary, without reference to that statute. *Apothecaries' Company* v. *Roby*, 1 Dow. & Ryl. 564. *S. C.* 5 B. & A. 949.

3. In an action to recover the amount of an apothecary's bill, the plaintiff, who, under the 55 *Geo.* 3, c. 194, proved a certificate from the Society of Apothecaries, need not also prove an apprenticeship served. *Sherwin* v. *Smith*, 1 Bing. 204.

APPEAL.—See Post. tits. { INCLOSURE. POOR. SESSIONS.

APPEARANCE.—See PRACTICE, Post.

APPORTIONMENT.—See Post. tit. LANDLORD AND TENANT.

APPRENTICE.

See also Post. tit. POOR.

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1. The binding an apprentice to a *feme covert* is void. *Rex* v. *Guildford*, 2 Chit. 284.

2. A declaration upon an indenture of apprenticeship, for a breach of a covenant, whereby a master, in consideration of a premium of 90*l.*, covenanted to instruct the apprentice in the business of a tobacconist, for four years, and to board and lodge him during that time, alleged, first, a general breach in the terms of the covenant; secondly a particular breach on the 13th *July*, averring a refusal to instruct on that day, or at any other time; and thirdly, a similar breach as to boarding and lodging on the same day, and alleging that on that day the master compelled the apprentice to quit the service, and refused to maintain and keep him, contrary to the effect of the covenant.

Pleas:—First, performance of the covenant until the 10th *July*. Secondly, willingness to maintain and keep the apprentice during the whole term; but that from the date of the indenture until the 10th *July*, the apprentice would not truly and faithfully serve the defendant, nor attend to his business, but on the 10th *July* refused so to do; and setting forth various acts of misconduct on his part during the interval mentioned; and concluding, that on the 10th *July* the apprentice, against the orders of the defendant, quitted the service, declaring that he would never return again, whereby the defendant was hindered and prevented from performing his covenant. Thirdly, readiness to instruct and maintain according to the effect of the covenant; but averring neglect and refusal of the apprentice to obey the defendant's lawful commands on the 10th *July*, and a refusal any longer to serve him; and absconding on that day, whereby he was prevented from performing his covenant. Fourthly, averring a wrongful absence of the apprentice on the 10th *July*, whereby, &c.: and Fifthly, a denial that the defendant had compelled the apprentice to quit his service.—And the replication took issue on the first and fifth pleas: and as to the others, there was a confession of the breaches of duty mentioned therein; but replying, that on the 13th *July* the apprentice returned to the defendant, and tendered and offered himself to serve and obey him according to the indenture, but that the defendant upon request refused to receive him, &c.—And the defendant demurred specially to the replication, and assigned for causes that the plaintiff had by his declaration, complained of a continued breach of covenant in not instructing, &c. the apprentice from the time of making the indenture to the commencement of the suit; and that although the second plea answered to the whole time in the declaration after the 10th *July*, yet that the plaintiff had omitted to reply to such parts of the defendant's second plea as related to not instructing, &c. the apprentice on the 10th *July*, and between that time and the 13th

July:—Held, that the plaintiff's claim was not entire, but divisible; and covered every part of the time, during which the master refused to instruct the apprentice; and consequently, that there was no discontinuance:—Held also, that the replication was not a departure from the declaration, the *gravamen* of the complaint being that the defendant had compelled the apprentice to quit his service, and the replication shewing the manner in which he had so done:—Held also, that the covenants in an indenture of apprenticeship are independent covenants; and consequently, that the acts of misconduct on the part of the apprentice, stated in the second plea, were not an answer to an action brought for a breach of the covenant by the master, to instruct and maintain the apprentice during the term agreed upon by the indenture. *Winstone* v. *Linn*, 1 B. & C. 460. *S. C.* 2 Dow. & Ryl. 465.

APPROPRIATION OF MONEY.—See Post. tit. PAYMENT.

ARBITRATION.—See AWARD, Post.

ARREST.

I. FOR WHAT CAUSE OF ACTION ALLOWED.

1. A defendant cannot be held to bail for the amount of a debt which may arise from the breach of an agreement. *Waters* v. *Joyce*, 1 Dow. & Ryl. 150.

2. But a defendant having guaranteed to the plaintiff the payment of money for goods to be sold and delivered by another person, and undertaken to pay for them if he should fail to do so, to the extent of a sum certain, may be arrested and held to bail for the amount of goods sold and sent within that sum, on the common affidavit. *Cope* v. *Joseph*, 9 Price 155.

3. A debt sworn to be due for use and occupation will support an arrest. *Lee* v. *Sellwood*, 9 Price 322.

II. WHO ARE PRIVILEGED FROM.

See *Novello* v. *Towgood*, 2 Dow. & Ryl. 833.

Post. tit. DISTRESS.

1. If an officer is privileged from arrest by his warrant or commission, such warrant should be shewn to the Court. *Batson* v. *M'Lean*, 2 Chit. 48.

2. The Court refused to discharge a prisoner in execution for debt, claiming privilege from arrest on the ground that he was one of the gentlemen of the King's Privy Chamber, it appearing that he was not a menial servant, had no stated duties to perform, received no fees in virtue of his office, and had no writ of privilege. *Tapley* v. *Battine*, 1 Dow. & Ryl. 79.

3. One of the King's yeomen of the guard having been arrested on process issued out of the *Palace Court*, without leave of the Lord Chamberlain, and that Court having refused to discharge him out of custody on filing common bail, he removed the cause into the *King's Bench*, by a writ of *habeas corpus cum causâ*, and put in and perfected bail upon the *habeas*:—Held that an *exoneretur* could not be entered on the bail-piece, even supposing the defendant privileged from arrest. *Sard* v. *Forrest*, 2 Dow. & Ryl. 250. *S. C.* 1 B. & C. 139.

4. The lighter of the fires and candles to the King's yeoman of the guard

was held entitled to be discharged out of custody on filing common bail, it being sworn that he had sometimes executed the duties of his office in person, though they were generally performed by his deputy. *Forster* v. *Hopkins*, 2 Chit. 46.

5. But the Court refused to discharge the Major of the *Tower* out of custody, on the ground that he was arrested when returning from an attendance on the *Prince Regent*, it not appearing that he had been attending by the command of his *Royal Highness*, although the defendant swore that he could not leave the *Tower* but on business connected with his official situation. *Batson* v. *M'Lean*, 2 Chit. 48.

6. So the *Deputy-Governor* of the *Tower* is not privileged as such. *Batson* v. *M'Lean*, 2 Chit. 51.

7. Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife; the Court refused to quash the writ, though the husband swore that before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him, in writing dispatches and other official documents. *English* v. *Caballero*, 3 Dow. & Ryl. 25

8. Attornies of the Courts of *K. B.* and *C. P.* sued by *capias* of privilege, may be arrested and held to bail. *Walker* (*Gent.*) v. *Rushbury* (*Gent.*), 9 Price 16.

9. A witness attending to give evidence in a Court of justice, who has absconded from his bail, may be retaken by the bail in Court; and he is not protected by his *subpœna*. *Horn* v. *Swinford*, 1 Dow. & Ryl. *N. P. C.* 20.

10. If a debtor who has become bankrupt and obtained his certificate, make a promise afterwards to a creditor to pay him a debt which was due to him before the bankruptcy at a future day, he not only revives the debt, and thereby renders himself liable to be sued for its recovery, but he may be held to bail in an action against him, founded on the demand so revived by the subsequent promise; because, as it becomes a good debt recoverable at law, it must have all the incidents of a legal debt, and all the ordinary modes of proceeding to recover it are open to the creditor. *Blackbourn* v. *Ogle*, 8 Price 526. *S. P. Drew* v. *Jefferies*, 8 Price 531. *n.*

III. WHERE MADE.

1. Arrests cannot be made within the Tower. *Batson* v. *M'Lean*, 2 Chit. 48.–51.

2. Where there were contradictory affidavits as to the place where the defendant was arrested, the Court refused to discharge him on the ground that the privilege of the place made the arrest illegal. *Batson* v. *M'Lean*, 2 Chit. 48.

IV. ILLEGAL, WHAT SHALL BE.

See Post. tits. { COSTS. DISCONTINUANCE.

1. Where there are cross demands between parties, and the balance due to the plaintiff does not amount to the sum limited by the statute, for which the defendant may be arrested and held to bail, such an arrest is within the principle of the third section of the 43 *Geo.* 3, c. 46; and must be considered as an arrest without any reasonable or probable cause. *Dromfield* v. *Archer*, 1 Dow. & Ryl. 67. *S. C.* 5 B. & A. 513.

V. IRREGULARITY IN, HOW PLEADED.

1. To an action of *assumpsit* against the defendant, as acceptor of a bill of exchange for 45*l.* he pleaded, after setting out the statute 51 *Geo.* 3, c. 124, that the plaintiff sued out a writ of *capias ad respondendum* against him by the name of *Joseph*, for 45*l.* on an affidavit of debt made by the plaintiff's clerk, under which the defendant was arrested, and afterwards allowed to go at large by the sheriff; that the writ was afterwards altered, by inserting the name of *Robert* (the real name of the defendant) instead of *Joseph*, under which he was again arrested, without any fresh affidavit of debt, as required by that statute:—Held, that such plea was bad on special demurrer, as it did not go to the merits of the action, and as the defendant might either have pleaded in abatement, or moved to set aside the proceedings for irregularity. *Warmsley* v. *Macey*, 5 Moore 168.

VI. RE-ARREST—WHERE ALLOWED.

1. A defendant being in custody within a local jurisdiction, the plaintiff lodged a detainer against him, but discontinued the action for fear of a plea to the jurisdiction, and then arrested the defendant in the Court of *King's Bench*, without having paid his own costs of the first suit:—Held, that the defendant was

not entitled to be discharged on filing common bail, the second suit not being vexatious. *Paine* v. *Gawdery*,
3 Dow. & Ryl. 33.

2. Where a defendant was arrested in the Mayor's Court at *Hereford*, and by the practice of that Court, a plaintiff is not bound to deliver a declaration without a rule to shew cause for that purpose, and the defendant, without conforming to the practice, superseded the action for want of a declaration, and was again arrested in *London* for the same cause of action; the Court discharged him on filing common bail. *England* v. *Lewis*, 3 Dow. & Ryl. 189.

VII. DISCHARGE FROM, WHO ENTITLED TO.

And see Post. tit. BARON and FEME.

1. The Court will not discharge a defendant out of custody on his filing common bail, unless he make out a clear case to entitle him to such discharge; but the defendant must be left to his plea. *Whittingham* v. *De La Rieu*,
2 Chit. 53.

2. Nor on the ground of his having become bankrupt and obtained his certificate in *Bremen*, where the debt was contracted. *Earlier* v. *Languiske*,
2 Chit. 55.

3. *Quære*—How far the *cessio bonorum* discharges a debt contracted in *Guernsey*. 2 Chit. 53.

4. Where an attorney was made a bankrupt, and described in the Gazette as a "dealer and chapman," and obtained his certificate; and the plaintiff afterwards arrested him as the acceptor of a bill of exchange, payable before the commission issued; the Court of C. P. discharged him on filing common bail, although the plaintiff swore, that he did not know that the defendant was the person mentioned in the Gazette, and that he intended to dispute the validity of the commission on the ground of fraud:—He should have stated the nature of such fraud, and when he discovered its existence. *Kemp* v. *Neville*, 5 Moore 21.

5. A defendant, arrested for a debt contracted partly before, and partly after his bankruptcy and certificate, was discharged out of custody on filing common bail, although he made a subsequent promise to pay the former part of such debt. *Peers* v. *Gadderer*,
2 Dow. & Ryl. 240.
S. C. 1 B. C. 116.

6. Where a bankrupt surrendered to his commission on the 4th *February*, and the Commissioners on his prayer enlarged the time *generally* in writing, for him to make a full discovery of his estate and effects, and verbally fixed the adjournment day for the 1st *April* following, and in the interval, the bankrupt, having surrendered in discharge of his bail, was detained at the suit of a creditor; the Court refused to discharge him out of custody, he not being protected from arrest by the Commissioners' order, as they could not give him a protection for an unlimited period of time. *Claughton* v. *Leigh*, 2 Dow. & Ryl. 831.
S. C. 1 B. & C. 652.

7. An application to discharge a defendant who is in prison under an extent for duties in his hands, being part of money received by him for premiums and duties on policies as agent of an insurance company, on the ground of his having been arrested by such company for the whole balance due from him to them, including such duties, before the extent issued, as to which debt he was afterwards discharged under an Insolvent Act—was refused, by discharging a rule to shew cause. *Rex* v. *Seton*,
8 Price 671.

8. If a plaintiff be in execution at the suit of a defendant for costs, alleged to have been paid to the latter by the Treasury, the Court of C. P. will not discharge such plaintiff out of custody on an affidavit of that fact, unless it be also sworn that the costs had been paid for the plaintiff. *Butt* v. *Conant*,
6 Moore 65.
S. C. 3 Brod. & Bing. 3.

9. Where a plaintiff, shortly before his making an affidavit of debt, had written a letter stating that the defendant was a creditor of his, the Court interfered summarily to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having negatived the writing of such letter by him, or alleged that the debt due to him had arisen subsequently to it. *Nizetich* v. *Bonacich*, 5 B. & A. 904.

10. Where a plaintiff arrested a defendant, and discontinued the action and paid him the costs, but before he was actually discharged out of custody, lodged a detainer against him for a larger debt arising out of the same cause of action: Held, that such detainer was irregular, and that the defendant was

entitled to be discharged out of custody on filing common bail. *White* v. *Gampertz*, 1 Dow. & Ryl. 556.

But see *S. C. contra*, 5 B. & A. 905.

11. Where a sheriff's officer on arresting a defendant, took five shillings from him, with a promise to pay the remainder of what was usual at a future day, and allowed him to go at large without taking a bail-bond, and without the plaintiff's assent, he cannot be surrendered in discharge of his bail; and an attachment having issued against the sheriff for not returning the writ, it cannot be set aside; nor will the Court of C. P. discharge him by allowing him to put in and justify bail. *Collins* v. *Snuggs*, 6 Moore 111.

12. Where a defendant was arrested, and executed a bail-bond by the initials of his Christian names only, as the acceptor of a bill of exchange, in which his initials only appeared: Held, that the bail-bond ought to be cancelled, but without costs. *Parker* v. *Bent*, 2 Dow. & Ryl. 73.

13. So if a defendant be arrested by the initials of his Christian name only, and sign a bail-bond in a similar manner; the Court of C. P. will discharge him on entering a common appearance, on his undertaking to bring no action. *Taylor* v. *Rutherman*, 6 Moore 264.

14. Where a widow was arrested upon a bill of exchange, accepted by her in the name of *W. S. Chatterley*, by which name she had always gone since her husband's death; *W. S.* being the initials of his Christian name; the Court set aside the bail-bond only, on entering a common appearance. *Mc. Beath* v. *Chatterley*, 2 Dow. & Ryl. 237.

15. If a defendant be arrested by the name of *Josiah*, instead of *Josias*, the Court of C. P. will discharge him out of the custody of the sheriff, on his entering a common appearance, and undertaking to bring no action against the sheriff or plaintiff. *Johnson* v. *Cooper*, 5 Moore 472.

VIII. OFFICERS, DUTIES AND FEES OF. See *Collins* v. *Snuggs*, 6 Moore 111. *supra*.

1. A tipstaff is entitled to take a fee of six shillings and no more, for conducting a prisoner from a Judge's chambers to the *King's Bench*. *In re Salisbury*, 5 B. & A. 266.

ASSUMPSIT.

I. BY AND AGAINST WHOM MAINTAINABLE.

1. An action of *assumpsit* will lie upon a bill of exchange against a trading Corporation, whose power of drawing and accepting bills is recognized by statute. *Murray* v. *East India Company*, 5 B. & A. 204.

2. But *assumpsit* will not lie against the Secretary at War by a retired clerk of the war-office for his retired allowance, although the Secretary had received the money applicable to such allowance. *Gidley* v. *Palmerston* (*Lord*), 3 Brod. & Bing. 275.

3. A printer cannot recover for labour, or materials used in printing any work, unless he affixes his name to it, pursuant to the statute 39 *Geo.* 3, c. 79, s. 27. *Bensley* v. *Bignold*, 5 B. & A. 335.

4. Where an agent employed in endeavouring to carry a bill through Parliament for making a railway, sued the chairman of a committee of subscribers

to the undertaking for his work and labour and expenses incurred as such agent, and it appeared that the agent himself was a subscriber to the undertaking: Held, that the action would not lie. *Holmes* v. *Higgins*,
2 Dow. & Ryl. 196.
S. C. 1 B. & C. 74.

5. Where the plaintiff and *J. T.* were appointed co-executors, and the latter at the time of the death of the testator was in co-partnership with the defendant until it was discontinued; after which, and before any adjustment of the accounts of the firm, *J. T.* died, leaving the plaintiff his co-executor him surviving; and *J. T.* during the partnership had paid large sums belonging to the testator's estate into the partnership account, and of which a separate account was kept in the partnership books to the credit of the testator's estate; and none of the funds of such estate ever came to the plaintiff, but were received by the partnership from *J. T.* his co-executor, without the knowledge of the plantiff; and the house of *J. T.* and the defendant became insolvent, and at the dissolution of the partnership there appeared on the books a credit to the testator's estate, no part of which was paid; and the plaintiff, the surviving co-executor of *J. T.* having commenced an action for money had and received, and declared, in his own right and not as executor against the defendant in his own right, and not describing him as the surviving partner of *J. T.*:—Held, that such action could not be maintained, as the fact of the plaintiff's being such surviving executor should have been stated in the declaration. *Fitzgerald* v. *Boehm*, 6 Moore 332.

6. In an action of *assumpsit*, on a contract to deliver pheasants on the 12th *October*, it is sufficient to support such action if they be sent on that day to a coach-office, though they do not arrive till afterwards. *Honeywood* v. *Stone*, 1 Chit. 142.

II. CONSIDERATION.

See Post. tit. Poor., I.

See *Lee* v. *Shore*, 2 Dow. & Ryl. 198.
S. C. 1 B. & C. 94. Ante. page 3.

1. The abandoning a suit, instituted to try a question in respect of which the law is doubtful, is a good consideration for a promise to pay a stipulated sum: Therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damages; and the former vessel was detained until bail was given; and, pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damages sustained, to indemnify them, and to pay a stipulated sum by way of damages: Held, that there being contradictory decisions as to the point, whether ship-owners were liable for an injury done while their ship was under the control of a pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge* v. *Dorville*, 5 B & A. 117.

2. Any five or more trustees, under a turnpike act, being authorised to make turnpikes with such suitable out-buildings and *conveniences* as they should think necessary on the intended line of road;—the owner of the soil next adjoining a toll-house, (erected in pursuance of the act) contracted with one of the trustees, on behalf of the rest, to sink a well for the convenience of the toll-house, the expense to be borne by each party equally: Held, that the sinking of the well was within the scope and authority of the trustees; that the contract entered into by one of them on behalf of the rest was valid; that the action to recover a moiety of the expense of the well was rightly brought in the name of the clerk of the trustees; and that their consent through the medium of one, that the well should be sunk, was a good consideration to support the action. *Newman* v. *Fletcher*, 1 Dow. & Ryl. 202.

III. INDEBITATUS, WHERE MAINTAINABLE IN RESPECT OF SPECIAL CONTRACT.

See *Bragg* v. *Cole*, 6 Moore 114.

1. Where there is a special agreement, which is conditional, the plaintiff must declare specially; and if he affirms that the agreement was cancelled, he must prove that it was acquiesced in by the defendant. *Davis* v. *Nichols*,
2 Chit. 320.

2. A contract to satisfy a debt by providing a cargo of wine, must be declared

on specially; and an action will not lie for the old debt. *Hoppe* v. *Symonds*, 2 Chit. 324.

3. Where the plaintiff declared that the defendant was indebted to him in the sum of 260*l.* on account, and that in consideration of the premises, and that the plaintiff would take and accept the work and labour of the defendant, as a plumber and glazier, at reasonable prices, to the extent of that debt, the defendant promised to do the work, and the common money counts were added; and it was proved that the plaintiff had by deed, assigned certain premises to the defendant for a sum therein mentioned, and such deed stated that sum to have been paid, and the plaintiff released the defendant therefrom; and parol evidence was given to shew that part of the purchase-money had not in fact been paid; but that it was agreed by parol between the parties at the time of the execution of the deed, that that part of the purchase-money should be returned by the defendant, and that he should do work for the plaintiff to that amount: Held, that inasmuch as the original debt was extinguished by the release in the deeds, and no new debt created, but merely an obligation to do work arising out of a new special contract, such contract ought to have been declared upon by the plaintiff. *Baker* v. *Dewey*, 1 B. & C. 704. *S. C.* (not *S. P.*) 3 Dow. & Ryl. 99.

IV. FOR MONEY PAID.

(*a*) *On express and implied Promises.*

1. The plaintiff and defendant entered into a joint and written contract with the owner of a vessel, to supply her with colonial produce at *Jamaica* by a given time. The contract not being complied with, the owner made a demand on the plaintiff alone, who agreed to refer the amount of the damage sustained by such owner to arbitration, without the knowledge or consent of the defendant. The arbitrator having awarded a certain sum to be due to the owner, the plaintiff paid the amount, and brought an action for money paid against the defendant, for a moiety thereof: Held, that he was entitled to recover. *Burnell* v. *Minot*, 4 Moore 340.

2. Where, in a warrant of attorney, *A.* became surety for *B.* for a debt due to *C.* a creditor; and after a commission of bankrupt had issued against *B.*, paid part of the debt to *C.*, and obtained from him an indemnity against personal liability for the remainder, the whole of the debt having been proved under the commission by *C.*, and satisfaction entered on the record: Held, that the bankrupt's certificate was no bar; but that *A.* might maintain an action of *indebitatus assumpsit* against *B.* for the money so paid, as having been paid to his use, notwithstanding the statute 49 *Geo.* 3, c. 121, s. 8. *Soutten* v. *Soutten*, 1 Dow. & Ryl. 521. *S. C.* 5 B. & A. 852.

3. By an Act of the 41 *Geo.* 3, for draining lands in the county of *Lincoln*, it was declared, "that the taxes to be charged and assessed, by virtue of the same, should be paid by the tenants of the lands, &c. charged with the same respectively, who might deduct and retain the same out of the rents payable to their respective landlords;" and also, that, in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear; and that, "if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a security for the payment thereof, and might be taken possession of, and let in discharge of the tax. Where, therefore, a tenant had quitted lands liable to a drainage-tax under this act, and after he had left, the collector levied the tax in arrear upon property which he had left in the possession of the succeeding tenant: Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenant for the time being; and therefore, that the plaintiff might maintain *assumpsit* against the landlord for money paid to his use. *Dawson* v. *Linton*, 1 Dow. & Ryl. 117. *S. C.* 5 B. & A. 521.

V. MONEY HAD AND RECEIVED.

(*a*) *To recover Money paid under legal Process.*

See *Cooper* v. *Wrench*, 1 Dow. & Ryl. 482. Post. page 27.

1. A writ of *fieri facias* having issued against a debtor at the suit of one creditor, and before it was executed, the attorney of another creditor having in the mean time obtained a warrant upon ano-

ther *fieri facias* from the same sheriff, directed to their clerk, and executed it before the prior execution was put in: Held, that the attornies were liable to the sheriff (who had made a return that he had levied the money under the first writ, and had in fact paid the amount of the debt to the creditor,) to refund the money levied under the second execution, in an action for money had and received to his use. *Sawle* v. *Paynter*, 1 Dow. & Ryl. 307.

And see *Cooper* v. *Wrench*, 1 Dow. & Ryl. 482. Post. page 27.

(*b*) *To recover Money obtained by Fraud.*

See *Turner* v. *Hoole*, 1 Dow. & Ryl. N.P.C. 27. Post. tit. Insolvent Debtor.

1. A sale of goods effected by fraud does not change the property in them. Therefore, where the defendant had fraudulently colluded with *I. S.*, who was in insolvent circumstances, to obtain wines from the plaintiff, the proceeds of which eventually came to the defendant's hands, in satisfaction of a debt due to him from *I. S.*: Held, that the plaintiff was entitled to recover in an action for money had and received. *Abbotts* v. *Barry*, 5 Moore 98.

(c) *From Trustees and Third Persons.*

1. In order to recover a share of a stake from a stakeholder, the plaintiff must shew his exact proportion of the sum deposited. *Robson* v. *Andrade*, *2 Chit. 263.

2. *A.* took from the *Board of Works* a piece of ground at *Westminster* for the erection of galleries at the King's coronation, and underlet part of it to *B.* on the same terms. The rent was paid by *B.* to *A.*, who deposited it in the hands of his bankers, with a condition, that if the coronation did not take place, and the rent was in consequence remitted by the *Board of Works*, the money was to be returned to *B.* The coronation took place; but in consequence of the speculation being unprofitable to the parties, the Crown remitted the whole rent to *A.*, who refused to return the money paid him by *B.*: Held, that *B.* might maintain an action of *assumpsit* for money had and received against the bankers as stakeholders. *Truscott* v. *Marsh*, 2 Dow. & Ryl. 712.

3. An action for money had and received is maintainable by an assured part-owner of a vessel, against an insurance-broker, who has received from the underwriters the full amount of the sums subscribed on a total loss, although there are several other persons interested as part-owners, and who had given the defendants notice of their interest, where the plaintiff insured on the whole ship generally, by means of his captain, who gave the order for effecting the insurance. *Roberts* v. *Ogilby*, 9 Price 269.

4. Where the plaintiffs were creditors and the defendants debtors to *T. & Co.*, and by the consent of all parties, an arrangement was made that the defendants should pay to the plaintiffs the debt due from them to *T. & Co.*: Held, that as the demand of *T. & Co.* on the defendants was for money had and received, the plaintiffs were entitled to recover on a count for money had and received, against the defendants. *Wilson* v. *Coupland*, 5 B. & A. 228.

5. *C.*, in consideration of a loan of 400*l.*, mortgaged lands in fee to *W. & Co.* in trust, to sell the same, and, after repaying themselves the money advanced, to pay over the surplus to his executors or administrators:—Before any sale was effected, *C.* died, having devised all his real and personal estates to trustees, whom he also appointed his executors, in trust, to sell the same, and pay debts, and discharge incumbrances:—In the lifetime of these trustees, *W. & Co.*, the original mortgagees, sold the estate, and paid over the surplus into the hands of the attorney or agent of the testator's trustees and executors:—Before the money was disposed of, the trustees and executors, and also their attorney, died, the latter leaving the defendant his executor. The plaintiffs took out administration *de bonis non*, with the will of *C.* annexed, and sued the attorney's executor in *assumpsit* for money had and received: Held, that an express promise by the defendant to pay the plaintiffs the money in question was a *nudum pactum*, they having no title to it in a Court of law; and that the action was not maintainable, as the money in the defendant's hands was equitable and not legal assets. *Clay* v. *Willis*, 2 Dow. & Ryl. 539. *S. C.* 1 B. & C. 364.

6. *A.* and *B.* severally kept cash at the same banking-house. On the 13th *November*, *A.* paid in a draft for 250*l.* drawn by *B.* in favour of the former, upon the bankers, to whom the latter was considerably indebted. The draft

was received by the bankers' clerk without any thing being said respecting it, or any entry made of it in their books. In the course of the same day, the bankers discounted bills for *B.* to the amount of 1600*l.* the produce of which he expressly appropriated to the charges of the day, consisting of bills accepted by him for 1342*l.*; two drafts for 50*l.* each, given to other persons; and the draft for 250*l.* in favour of *A.*, which was presented before the latter drafts. The bills and the two 50*l.* drafts, were paid by the bankers on the same day, leaving a balance only of 137*l.* in their hands. On the morning of the 14th, they wrote a letter to *A.*, stating that they had not carried the draft for 250*l.* to his credit, but that they would "retain it by them in the hope of its being provided for;" and they promised *B.* that they would pay it when they had funds. On that day the bankers discounted other bills for *B.* to the amount of 699*l.*; the produce of which he specifically appropriated to claims upon him, amounting to 599*l.*; after which an unappropriated balance of 98*l.* remained in the bankers' hands: Held, that they were liable to *A.* for the whole amount of the 250*l.* draft, in an action for money had and received, though they had not at any moment an unappropriated sum in their hands sufficient to cover the draft. *Kilsby* v. *Williams*, 1 Dow. & Ryl. 476. *S. C.* 5 B. & A. 815.

7. Two several banking firms, carrying on business respectively in the same country town, were in the habit of exchanging notes and securities with each other, and settling their balance by a prescribed mode. One of the firms became bankrupt, and at the time of the act of bankruptcy, each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprized of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly from their agents in *London*, who did not know the situation of the parties: Held, that the solvent firm might recover the amount of the notes, in an action for money had and received against such provisional assignee. *Edmeads* v. *Newman*, 2 Dow. & Ryl. 568. *S. C.* 1 B. & C. 418.

8. *A.* sold goods to *B.* in *America*, to be shipped for an *European* port, and paid for by bills in different sets, and at different dates, drawn by *B.* in favour of *A.* upon *C. & Co.*, a mercantile house in *London*; *D.* was appointed supercargo and joint trustee by *A.* and *B.* for securing remittances to the house in *London*, for the honour of the bills. The goods being shipped for *Europe*, *B.* and *D.* respectively advised *C. & Co.* of the transaction, who effected an insurance upon the cargo, by *B.*'s direction, and at his expense. The ship in her voyage was captured; and *B.* abandoned the cargo to the underwriters as for a total loss; the amount of which was paid to *C. & Co.* in *London*, who placed it to the credit of *B.* The *London* house honoured the first set of bills before any fruits were received from the policy; and advised *A.* of that fact, in consequence of a letter received from him upon the subject of the bills; informing him that they could then say nothing about the other bills, as the fate of them would depend (not being accepted) upon *B.*'s account when they became due; with an assurance, however, that they would do every thing they could with propriety to further the views of all parties. By a subsequent letter, they advised him of the payment of a second set, stating, that they did not know what would be the fate of the third, which had not then appeared for acceptance: but that they would do all they could to prevent loss to the parties:—Part of the remaining set of bills was subsequently paid, but the rest was refused payment by *C. & Co.* *B.* became bankrupt, and *C. & Co.* accounted with him prior to, and with his assignees, subsequent to his bankruptcy, for all the money ever received by them on his account. *A.* received under *B.*'s commission, a dividend upon the bills remaining unpaid; and his administrator brought an action for money had and received, against *C. & Co.* for the balance:—Held, that the action was not maintainable. *Neale* v. *Reid*, 3 Dow. & Ryl. 158. *S. C.* 1 B. & C. 657.

9. *A.* having money due to him from *B.*, who was also indebted to other persons, took a warrant of attorney for the whole amount of the several debts in the usual terms. *A.* afterwards assigned his interest in the warrant of attorney to *C.* for a valuable consideration, who entered up judgment, and took out execution against *B.*'s effects; and the

money was levied by the sheriff, who paid it over to *B.*'s assignees (he having become bankrupt) upon an indemnity.—*Semble*, that an action of *assumpsit* for money had and received to the bankrupt's use, would lie at the suit of *C.* against the assignees. *Cooper* v. *Wrench*, 1 Dow. & Ryl. 482.

10. Where the plaintiff, in a declaration of *assumpsit*, stated that in consideration that he would employ the defendant (an annuity-broker) to invest and lay out the plaintiff's money in the purchase of an annuity, the defendant undertook to invest it on good and valid security; and assigned for breach, that he laid it out on a bad, invalid, and fraudulent security; and the defendant pleaded *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*, on which issue was joined; and it was proved that the consideration money was paid over to the grantor, and the annuity paid by the hands of the defendant to the plaintiff for six years afterwards, when the grantor became bankrupt and the security failed; subsequently to which, the defendant's managing clerk promised that the plaintiff should be paid, which promise the defendant afterwards recognised: Held, that the plaintiff could not recover for money had and received, the money having been paid over to the grantor; nor on an account stated, as there was no existing antecedent debt between him and the defendant. *Whitehead* v. *Howard*, 5 Moore 105.

VI. PLEADINGS.

1. In *assumpsit* for work and labour in healing horses, within the jurisdiction of the County Court, and for potions, &c. administered on those occasions: Held, that this amounted to a sufficient allegation that the potions were administered within the jurisdiction of such County Court. *Dunn v. Crump*, 3 Brod. & Bing. 309.

2. Goods taken under an execution against *A.* which had been in his possession more than two months before the issuing a commission against him, may be considered as his property, under 49 *Geo.* 3, c. 121, s. 2, and may be described as such in a declaration of *assumpsit* by his assignees, on a guarantee given by the defendants to the bankrupt. *Sampson* v. *Burton*, 4 Moore 515.

3. An allegation, "that in consideration that the plaintiff, at the request of the defendant, *had* caused to be shipped on board the defendant's vessel, a quantity of wheat to be carried safely to *W. T.*, for freight to be therefore paid, the defendant undertook to carry safely," is supported by evidence of the defendant's having admitted an undertaking to carry, though it appeared that all the wheat was not put on board till the day after such admission. *Streeter* v. *Horlock*, 1 Bing. 34.

4. In an action for a breach of promise of marriage, a count alleging a promise on the part of the defendant to marry the plaintiff within a reasonable time after request, and averring "that the plaintiff, confiding in the promise, had always remained unmarried, and was still ready and willing to marry the defendant; and that although a reasonable time for the defendant to marry him had elapsed, yet that the defendant, not regarding her promise, did not, nor would within such reasonable time, marry the plaintiff, but had hitherto wholly neglected and refused so to do,"—is sufficient after verdict: without averring that the defendant had any notice of the plaintiff being ready to marry her during the reasonable time alleged, or averring any request made to the defendant to marry the plaintiff, or any averment of a special refusal to marry him. *Seymour* v. *Gartside*, 2 Dow. & Ryl. 55.

5. Where the plaintiff, as administrator, declared in *assumpsit* that the intestate had retained the defendant as his attorney, to investigate and procure a good title of an estate about to be conveyed to the intestate as purchaser, and assigned for breach that he did not do so; but accepted a bad and defective title in the lifetime of the latter, whereby his personal estate was much injured:—Held on demurrer to the declaration, that the action was well brought; although it was objected, first, that though it was framed in contract, it was in substance a *tort*, arising from a neglect of duty by the defendant; secondly, that the heir should have sued, and not the administrator, as it was a contract which ran with the land; and lastly, that it was not alleged in the declaration, that the defendant undertook to ascertain and procure a good title in his professional character as an attorney;—for that by the demurrer, the defendant admitted the promise to the intestate, as well as the allegation that the injury accrued to his personal

estate during his lifetime; and it must be implied that he was bound to fulfil his duty as an attorney, it being alleged that the intestate employed him as such. *Knights* v. *Quarles*, 4 Moore 532.

6. Where, to a declaration in *assumpsit* for coals obtained by the defendant from a pit of the plaintiff, the defendant pleaded that the plaintiff had distrained the defendant's goods for the same identical cause of action; and the plaintiff demurred specially, that it did not appear by the plea that all his damages were satisfied:—Held, that the plea was no answer to the action. *Lees* v. *Wright*, 1 Dow. & Ryl. 391.

VII. EVIDENCE.

1. In *assumpsit* for goods sold, and on an account stated, to recover the value of growing-poles purchased from the plaintiff by the defendants, and afterwards carried away by them; it appeared in evidence that at the time of the bargain some memorandums in writing had been made, but which were neither stamped nor signed by the parties; and it was also proved, that the defendants, after the poles were carried away, admitted that a balance was due to the plaintiff, who, under these circumstances, was nonsuited:—Held, that such nonsuit was proper, as it was not proved that the defendants had admitted a precise and definite sum to be due to the plaintiff; and therefore that he could not recover on the account stated, without reference to the memorandums, which were not admissible in evidence: but as the contract had been executed by the defendants, they having carried away the poles, the Court of C.P. granted the plaintiff a new trial, on payment of costs. *Teall* v. *Auty*, 4 Moore 542.

2. Where the plaintiff assigned his ship to the defendant as a security for the repayment of money; but on the register it appeared to be an absolute assignment, and the defendant sold the ship, and told the plaintiff that he had received the purchase-money, and would account with him for the balance of the proceeds of the sale:—That Court held, that the plaintiff was entitled to recover his balance in an action on the money counts; the acknowledgment being sufficient to support the action. *Prouting* v. *Hammond*, 8 Taunt. 688.

3. Two unstamped slips of paper, with "*I. O. U.* 400*l.*" and "*I. O. U.* 250*l.*" written thereupon, are neither promissory notes nor receipts; and may be therefore received in evidence for money lent. *Childers* v. *Boulnois*, 1 Dow. & Ryl. N.P.C. 8.

4. *A.* by deeds of assignment, and bargain and sale, assigned and sold respectively an unexpired lease of premises, and the fee simple of a messuage, &c. to *B.*; and in each instrument recited that he had received the purchase-money, and on the back of each wrote a receipt for the purchase-money in full: after which, a memorandum of agreement not signed or stamped, was drawn up between the parties, reciting that *B.* had lately purchased of *A.* the premises in question; and that *A.* being indebted to *B.* in the sum of 100*l.* had agreed that the same should be considered as in part payment of the said purchase-money; but it being understood, that in case the dividend about to be paid by *A.* to his creditors should not amount to twenty shillings in the pound, then that *A.* was to do work for *B.*, in his line of a builder, to the amount of such deficiency; and further, that *B.* was to retain in his hands the sum of 60*l.*, to be also considered as in part payment of the said purchase-money, and for which said sum *B.* was to do and perform work for *A.* in his line of a plumber and glazier.—*Indebitatus assumpsit* being brought by *A.* to recover the money actually due to him, as the purchase-money of the premises in question, the declaration alleging that the sum was due for and in respect of divers tenements, &c. sold by the plaintiff to the defendant; and that thereupon, in consideration that the plaintiff would take the work and labour of the defendant as a plumber and glazier, at reasonable prices, to the extent of the said debt, in payment and satisfaction thereof, the defendant undertook to do and perform for the plaintiff all such work and labour as he might require, to the extent of the said debt, averring readiness of the plaintiff to receive the work, and refusal of the defendant to perform it:—Held, that neither the agreement nor parol evidence of its contents was admissible, to shew that the consideration-money had not been paid. *Baker* v. *Dewey*, 3 Dow. & Ryl. 99. *S. C.* 1. B. & C. 704.

ATTACHMENT.

I. FOR NON-PAYMENT OF COSTS.

For Attachments against Sheriffs,
See Post. tit. SHERIFF.

1. The rule for an attachment for non-payment of money in pursuance of the Master's *allocatur*, is only a rule *nisi* when the *allocatur* is founded on an award. *Rex* v. ———, 2 Chit. 57.

2. If a party obtain a rule for setting aside judgment and execution, on condition of his paying costs, the Court will not issue an attachment in the first instance for not paying those costs. ——— v. *Mynde*, 1 Chit. 158.

3. An attachment was ordered absolutely in the first instance against an attorney, for non-payment of money, pursuant to an order to another attorney of the party for whom the former had been changed by order of the Court of *Exchequer;* although in the orders for changing the attorney, and for payment of the money, he had been called *John*, whereas his real name was *James*; but he had attended several summonses taken out as against *John*, and had consented to some of them without objecting to the *misnomer*; which that Court thought, under the circumstances, cured the mistake. *Stevenson* v. *Power*, 9 Price 384.

4. Personal service of an attachment against an attorney for not paying money pursuant to the Master's *allocatur*, cannot be dispensed with. *In re* ———, (*Gent.*) 1 Dow. & Ryl. 529.

II. CONTEMPT.

See Post. tit. WARDEN OF THE FLEET.

1. The report of the Master of the Crown Office, that a defendant and his attorney were in contempt for not obeying an award and filing a bill, is to be taken as a conviction: and on the defendant's being brought up for judgment, the Court will not receive affidavits in denial of the contempt, but only in mitigation of punishment. *Coulson* v. *Graham*, 2 Chit. 57.

ATTORNEY.

I. CLERKS OF, HOW DISCHARGED FROM ARTICLES.

1. A rule *nisi* can only be granted to discharge an articled clerk, where the attorney had become bankrupt and absconded; and the rule must be served at the last place of abode of the clerk to the commission, and stuck up in the King's Bench Office. *Anonymous*, 2 Chit. 62.

II. QUALIFICATIONS OF ADMISSION.

1. An articled clerk, who has served part of his clerkship with an attorney who died before the clerkship was completed, is at liberty, after an interval of six years from that time, to serve the remainder of his clerkship with another attorney, with a view to his admission. *In re Smith*, 1 Dow. & Ryl. 14.

2. A clerk, in order to be admitted an attorney, must actually serve five years under articles:—Therefore, where a clerk had served part of his time with a master who afterwards left this country, and before his articles were assigned to another master, an interval of ten months had elapsed, during which time he did not serve under any articles, but served the remainder of the time specified under the assignment; the Court would not allow him to be admitted until he had served the remaining ten months under new articles. *Ex parte Rowle*, 2 Chit. 61.

3. A clerk to an attorney, held during the term for which he was bound, the office of surveyor of taxes under the Crown:

Held, that he could not be considered as having served his whole time in the proper business of an attorney, within the 28 *Geo.* 2, c. 46, ss. 8 & 10; and that he ought not to be admitted on the roll; and that, having been admitted, he must be struck off. *In re Taylor*,
5 B. & A. 538.

4. The statute 34 *Geo.* 3, c. 14, s. 2, requires that the indentures of an attorney's clerkship shall be enrolled or registered with the proper officer of the Court, together with an affidavit of the time of executing the same, before the clerk shall be admitted to practise as an attorney; and enacts, that unless the indentures are enrolled or registered within six months next after execution, together with the affidavit of the time of execution of such contract, the service shall be deemed to commence from the time of enrolment or registry only.—Where therefore, a clerk had been articled to an attorney in the country, and the indentures had been sent to *London* to be enrolled in the Master's Office, pursuant to the statute, and after the clerkship had been served, no trace of the indentures could be discovered in that office; the Court refused to admit him, although it appeared from the books of the town agent, that a clerk of the latter had tendered the fees payable in the Master's Office upon enrolment, cotemporaneously with the time when the enrolment was supposed to have taken place. *Ex parte Pilgrim*,
2 Dow. & Ryl. 429.
S. C. 1 B. & C. 264.

III. CERTIFICATE.

1. If the certificate of an attorney of the Court of C. P. be, through mistake of his agent, filed in K. B. where he was not admitted for four successive years, such certificate may be entered and filed in the former Court, on a notice of the fact being given to the Stamp Office. *Ex parte Jones*,
4 Moore 347.

2. It is no ground for cancelling a bail-bond, that the attorney who sued out the writ had neglected to take out his certificate. *Welch* v. *Pribble*,
1 Dow. & Ryl. 215.

IV. RE-ADMISSION.

1. An attorney who has ceased to practise for several years, may be re-admitted without paying the arrears of duty. *Ex parte Cunningham*, 1 Bing. 91.

2. So an attorney who discontinued to practise after his last certificate expired, may be re-admitted without payment of any arrears of duty or any fine; for the word "neglect," in the 37 *Geo.* 3, c. 90, s. 31, means *culpable neglect;* and does not apply to a person who has omitted to take out his certificate during the interval of his ceasing to practise. *Ex parte Matson*, 2 Dow. & Ryl 238.

3. If an attorney has entered into trade, and discontinued to practise for twelve years, the reasons for his quitting such trade must be satisfactorily explained before he can be re-admitted. *Ex parte Mayer*, 5 Moore 141.

V. PRIVILEGES AND DISABILITIES OF.

See *Wilkinson* v. *Diggles*, 2 Dow. & Ryl. 302. *S. C.* 1 B. & C. 158. Post. page 35.

1. An attorney must be sued by bill, although he has given a bill of exchange; and the plaintiff being also an attorney, the Court set aside the proceedings with costs. *At..ns* v. ——,
2 Chit. 63.

2. Attórnies and clerks in the Court of *Exchequer* may sue attornies of the other Courts (where the debt warrants it) by *capias* of privilege in that Court. *Walker, (Gent.)* v. *Rushbury, (Gent.)*,
9 Price 16.

3. Where process appeared to be sued out in the name of *A.* by *B.*, neither of whom were attornies of the Court out of which it was sued, and *B.* had no authority from any other attorney to act in his name, the Court of C. P. set aside the proceedings, and ordered *A.* and *B.* to pay the costs. *Hawkins* v. *Edwards*,
4 Moore 603.

4. A person under examination before a Justice of Peace on a charge of felony, has no right to have a legal adviser as an advocate on his behalf; still less to cross-examine the witnesses for the prosecution, and to examine opposing testimony to prove his innocence. The privilege when allowed, is entirely a matter of discretion in the Justices, as the investigation is merely preliminary, and not conclusive on such person. *Cox* v. *Coleridge*, 2 Dow. & Ryl. 186.
S. C. 1. B. & C. 37.

5. An attorney cannot recover a charge for conducting a suit in which the party charged has not had the benefit of the attorney's judgment and superintendance. Therefore, where in an action on an attorney's bill it appeared that the plaintiff lived at *D*, five miles from *W.*; and the defendant lived at

H., fourteen miles from *W.*; and applied to *J. B.* (who resided at *W.*, and who had been a clerk of the plaintiff's, and practised in his name,) to carry on the suit for which the bill in question was incurred; and *J. B.* did so; and it did not appear that the defendant ever saw the plaintiff, or had the benefit of his judgment; and the business done at the office at *W.* was for *J. B.*'s benefit; except one-third, which the plaintiff received for merely coming over once a-week; and the plaintiff's name was not on the door at *W.*, nor was he employed by *J. B.* in soliciting business; but *J. B.* frequently consulted with the plaintiff: and drafts were sometimes ingrossed at *D.* for the office at *W.*; and the draft of the brief in the suit which *J. B.* had carried on for the defendant was in the handwriting of the plaintiff, as well as some items in *J. B.*'s books touching that suit: and the defendant when applied to, admitted the sum claimed, but required to set off a sum due to him from *J. B.*, which was refused: Held, that a nonsuit, directed by the Judge who tried the cause, was proper. *Hopkinson* v. *Smith.* 1 Bing 13.

6. If an attorney, being in prison, enters a plaint, or sues out or commences any process in the County Court, he is within the statute 12 *Geo.* 2, c. 13, s. 9, and liable to be struck off the roll. *Ex parte Flint,* 2 Dow. & Ryl. 406.
S. C. 1 B. & C. 254.

7. *Quære,*—Whether the affirmation of a Quaker is admissible to call on an attorney to answer the matter of an affidavit. *In re Gellibrand,*
1 Dow. & Ryl. 121.

VI. DUTIES AND LIABILITIES.

1. An attorney concerned for the plaintiff in the cause as his agent, must upon all bailable *mesne* process, and every writ of attachment and *fieri facias*, and *capias ad satisfaciendum*, indorse the place of abode and condition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give. *Reg. Gen.* H. T. 2 & 3 *Geo.* 4.
1 Dow. & Ryl. 471.
5 B. & A. 560.
2 Chit. 377.

2. A general undertaking by an attorney to appear to process, does not oblige him to put in bail to bailable process. *Anonymous,* 2 Chit. 415.

3. It seems that the duty of an attorney is not so strict but that if he is lulled by the assurance of his client into a persuasion that a security on which such client proposes to advance money is good, so as to abate his vigilance in the inquiry into its validity, his liability for negligence is discharged. *Wilson* v. *Tucker,* 1 Dow. & Ryl. N.P.C. 30.

4. An attorney making an affidavit to support a motion to set aside an outlawry against a defendant who has not appeared, must shew that he is authorized to act for the defendant. *Volet* v. *Waters,* 3 Dow. & Ryl. 55.

5. The Court will not call on a defendant to verify on affidavit a plea sworn by the plaintiff to be false, nor require the defendant's attorney to disclose the authority by which he pleads a sham plea. *Merrington* v. *A'Beckett,*
3 Dow. & Ryl. 231.
S. C. 2 B. & C. 81.

6. The Court will compel an attorney to pay the costs occasioned by his vexatious conduct in giving repeated notices of justifying bail at Chambers in vacation. Therefore, where a defendant had been removed by *habeas corpus* from *Lincoln* Castle to the *King's Bench* prison, and the plaintiff had been put to the expense of inquiring after six sets of bail, as to one of whom a false description had been given; the Court ordered the defendant's attorney to pay the costs incurred by the plaintiff, although it was sworn that such attorney had no personal knowledge of the misdescription and insufficiency of the bail. *Blundell* v. *Blundell,* 1 Dow & Ryl. 142.
S. C. 5 B. & A. 533.

7. Where the Prothonotary refused to allow costs on account of gross misconduct by the plaintiff's attorney,—the Court of C. P. refused a rule for the Prothonotary to review his taxation, though the defendant had stayed the proceedings under a rule for staying them on payment of the debt and costs. *Adams* v. *Staton,* 1 Bing 69.

8. An attorney employing an agent to do business for his client, is primarily liable to such agent for his bill, though the latter knows the business to be done for the client; but to whom the credit is given is a question for the Jury. *Scrace* v. *Whittington,*
3 Dow. & Ryl. 195.
S. C. 2 B. & C. 11.

9. If there is reasonable and probable

cause for applying to the Court against an attorney, although it eventually turns out that there is no actual foundation for imputing misconduct to him, the Court will not give him the costs of the application. *Doe d. Thwaites* v. *Roe*, 3 Dow. & Ryl. 226.

10. Where an attorney, in order to get possession of papers belonging to *A.* in the hands of *A.*'s former attorney, who had a lien upon them for the amount of a bill then in dispute, undertook that *A.* should enter into an unqualified reference not revocable: Held, that *A.*, having afterwards become bankrupt for the second time, and without paying fifteen shillings in the pound, the proof of the debt under the commission was not an *election* by the former attorney under 49 *Geo.* 3, c. 121, s. 14, so as to dispense with the reference; and that the attorney was liable, pursuant to his undertaking to procure *A.*'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the Master. *Ex parte Hughes*, 5 B. & A. 482.

11. It seems that proceedings in bankruptcy are not proceedings in *Chancery*. Where therefore, in an action of debt on the statute 2 *Geo.* 2, c. 23, for acting as a solicitor in the Court of *Chancery*, (viz. In the matter of *T. S.* a bankrupt,) the defendant not being a solicitor of the said Court: the plaintiff having proved that the defendant had been consulted, and been instrumental in the matter of a petition to the Lord Chancellor, by the creditors of *T. S.*, (which petition bore the name of certain admitted solicitors, and was entitled "In bankruptcy,") praying for the taxation of the bill of the solicitor to the commission, was nonsuited; the Court of C. P. refused to set it aside. *Ford* v. *Webb*, 3 Brod. & Bing. 241.

12. The respective attornies for the plaintiff and defendant in a horse cause, which was ready for trial, but had been withdrawn at the assizes, signed the following undertaking or agreement:—"We, the undersigned, attornies for the above-named plaintiff, and the above-named defendant, do hereby *personally* consent, undertake, and agree, that the record in this cause shall be withdrawn; that the above-named defendant shall take back again the horse in the pleadings in this cause named, and shall pay the sum of 64*l.* 17*s.* to the above-named plaintiff; *that the costs of the suit on the part of the defendant shall be taxed between the parties, on the principle between plaintiff and defendant*; and that such taxation shall be made and perfected by, &c." Held, that the plaintiff's attorney, in the original action, was personally liable upon this undertaking to pay to the defendant's attorney the costs when taxed, pursuant to the agreement. *Iveson* v. *Corington*, 2 Dow. & Ryl. 307. *S. C.* 1 B. & C. 160.

And see *Burrell* v. *Jones*, 3 B. & A. 47.

VII. SUMMARY JURISDICTION OF THE COURTS OVER.

See *Stevenson* v. *Power*, 9 Price 384.
Ante, tit. ATTACHMENT, 2. 3.

1. A summary application may be supported against an attorney to compel him to pay monies received by him, though he was not employed in any suit: and an agent may make the application, though he has no authority to receive; and the Court will compel the payment into Court for the benefit of the parties interested. *De Wolfe* v. ———, 2 Chit. 68.

2. The Court of C. P. granted a rule *nisi*, calling upon an attorney to answer for an alleged misconduct in a matter where no suit was depending, but which appeared to have been entrusted to him in the capacity of an attorney. *In re Knight*, 1 Bing. 91.

3. But that Court will not proceed or call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence; but will leave the parties complaining to their prosecution for such offence. *Short* v. *Pratt*, 1 Bing. 102.

S. P. In re Knight, 1 Bing. 142.

4. *A.* being committed for forgery, the prosecutor called on him in prison, and said he had no wish to appear against him, but that the attorney concerned would proceed unless his costs were paid, which the prosecutor had no means of paying: he then proposed that *A.* should advance the money, which he did; and it got into the hands of the prosecutor's attorney: notwithstanding this, *A.* was put on his trial, and the prosecutor appeared against him. *A.*, however, being acquitted, applied to the Court of C. P. to compel the prosecutor's attorney to refund the money, on an affidavit of his innocence of the offence charged against him; and that he had

paid the money, because from his knowledge of the parties, he believed his life was then in danger; but the Court refused to interfere. *Ex parte Brookes*, 1 Bing. 105.

5. Where a person not having been admitted an attorney of the Court of C. P., had acted as such by issuing out process; they would not grant an attachment against him, but left the party to sue for the penalty given him by the statute 2 *Geo.* 2, c. 23, s. 24. *Matthews* v. *Royle*, 6 Moore 70.

And see *Ex parte Flint*, 2 Dow. & Ryl. 406, Ante. page 31.

6. The jurisdiction of the Court of *Exchequer*, and its authority to make orders for the payment of a Crown solicitor's bill of fees, is independent of the statute 2 *Geo.* 2, c. 23, and is founded on the necessary and inherent controul of the Court over the conduct of its officers; and delay to a certain extent in making an application to the Court for such purpose, will not in a gross case on the part of such solicitor, be considered laches. *Rex* v. *Bach*, 9 Price 349.

7. Where an attorney brought an action for his bill of costs, and arrested the defendant for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing: Held, that this was a case within the statute 43 *Geo.* 3, c. 46, s. 3; and that if not, still that the Court in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances. *Robinson* v. *Eisam*, 5 B. & A. 661.

8. By the statute 22 *Geo.* 2, c. 46, s. 11, it is enacted, "that if any sworn attorney or solicitor shall suffer his name to be used by an unqualified person, to enable him to practise as an attorney or solicitor, and complaint shall be made thereof in *a summary way, and proof made thereof upon oath to the satisfaction of the Court*, such attorney or solicitor shall be struck off the roll;" and by the same section it is enacted, "that in that case, *and upon such complaint, and proof made as aforesaid*, it shall be lawful for the Court to convict such unqualified person, so acting or practising as aforesaid, to the prison of the said Court for any time not exceeding one year:" Held, that a person brought within the latter branch of the section, upon an affidavit of his offence, was not entitled to have the witnesses in support of the charge examined *viva voce*. After the matter had been referred in such a case by consent of counsel to the Master of the Crown Office, who reported the party to be in contempt, the Court allowed the latter to bring the whole of the case under their own consideration, when brought up to be committed. *In re Jaques*, 2 Dow. & Ryl. 64.

9. Where a bailiff had written to an attorney for writs, which the latter sent him without knowing any thing of the parties or circumstances; but the bailiff never represented himself, nor had been considered as an attorney, nor looked for any profit upon the law proceedings: Held, that this was not a case within the 22 *Geo.* 2, c. 46, s. 11; but that it was a most improper practice, which the Court by virtue of its general jurisdiction over attornies, would punish severely. *Ex parte Whatton*, 5 B. & A. 824.

10. An attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profit instead of a salary. The names of both were painted on the office door, and bills for business were made out and delivered in their joint names: —Held, that this was a case within the 22 *Geo.* 2, c. 46, s. 11, inasmuch as the attorney had allowed his name to be used for, and on account of an unqualified person: and the Court ordered the attorney to be struck off the roll, and the conveyancer to be committed to prison for a month. *In re Jackson*, 1 B. & C. 270.

11. The Court struck two attornies off the roll for knowingly permitting an unqualified person to practise as an attorney in their names, for his own profit, contrary to the 22 *Geo.* 2, c. 46, and sentenced such unqualified person to be imprisoned for three months in the prison of the Court: and the latter being previously a prisoner for debt, was ordered to be brought up without a day rule, on a suggestion that he was unable to pay the expenses of such rule. *In re Clark*, 3 Dow. & Ryl. 260.

12. The Court of C. P. refused to strike an attorney off the roll of that Court on the ground of his having been struck off the roll of the Court of *King's Bench*, unless the contents of the affidavit on which that Court acted be stated, and there be proof or allegation that the

attorney had been struck off for a misdemeanour. *Ex parte Hague*, 3 Brod. & Bing. 257.

13. So the Court of C. P. refused to strike an attorney off the roll on the ground that he had not served a regular clerkship, and had misconducted himself previously to his admission, as there was no charge of misconduct subsequently to such admission. *In re Page*, 1 Bing. 160.

14. *Quære*—Whether an attorney, who keeps out of the way to avoid service of the Master's *allocatur*, is eligible to remain any longer on the roll? *In re* ——(*Gent.*) 1 Dow. & Ryl. 529.

VIII. PROCEEDINGS AND PLEADINGS IN ACTIONS AGAINST.

See *Ford* v. *Webb*, 3 Brod. & Bing. 241. Ante, page 32.

1. The Court will stay proceedings if a defendant be sued by bill as an attorney, when he is not one. *Nabb* v. ——, 2 Chit. 396.

2. In an action against an attorney for non-feasance, in not looking properly into a title,—it is sufficient to state that he was retained as an attorney, without stating the consideration. If diligence would have been ineffectual, the defendant must prove it; and if the declaration states that the defendant was an attorney of a particular Court, the plaintiff must prove it, though the defendant put in his plea as such. *Bourne* v. *Diggles*, 2 Chit. 311.

IX. TAXATION AND PAYMENT OF BILLS OF COSTS.

1. Independently of the statute as to the taxation of costs, the Court still retains power at common law to order bills generally to be taxed. *Anonymous*, 2 Chit. 155.

2. An attorney's bill may be referred for taxation, after a verdict has been found for the full amount. *Nuttall* v. *Marr*, 3 Dow. & Ryl. 33.

3. An attorney's bill may be referred to the Master for taxation, after an action had been brought upon it, and a verdict recovered, on a suggestion that some of the items therein would not have been allowed by the master had it been originally referred to him, but only upon the terms of the defendant's paying the costs of the application and taxation, and also those of the cause as between attorney and client, the plaintiff being at liberty to take out money forthwith, which had been paid into Court. *Lee* v. *Wilson*, 2 Chit. 63.

4. Where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time; and cannot recover them by motion after making a subsequent settlement. *Whitfield* v. *James*, 1 Bing. 207.

5. Fees charged by an attorney for holding a Court-leet, as steward of a manor, are taxable in the same manner as charges for business done strictly in the professional character of an attorney. *Lethbridge* v. *Luxmore*, 1 Dow. & Ryl. 511. *S. C. nomine Luxmore* v. *Lethbridge*, 5 B. &. A. 898.

6. The bill of costs of an attorney agent to the attorney employed by the party in respect of whose business the agency charges have been incurred, will not be ordered to be referred to the Master to be taxed, on the application of the client. *Wildbore* v. *Bryan*, 8 Price 677.

7. If, on the taxation of a Crown solicitor's bill of fees and disbursements, so large a sum be disallowed as to make it a matter of reprobation by the Court, they will not only order the costs of the taxation to be paid by the solicitor to the defendant, but if he has received the whole bill by sums paid him on account, they will order him to pay interest for the balance which the Master shall report to be due from him, in consequence of the disallowance of the sums taxed off; although some of the disallowed charges be for sums paid to others for services in aid of the Crown solicitor's duty, and it be not shewn that he made any interest on the balance. *Rex* v. *Bach*, 9 Price 349.

8. On a motion for a rule *nisi* for an attachment against an attorney, for not delivering a bill of costs, pursuant to a Judge's order for that purpose, an affidavit must be sworn of the personal service of the rule. *Anonymous*, 2 Chit. 66.

9. So, on such motion for not paying over surplus money when a rule has been served for taxing an attorney's bill, the Court will not grant an attachment against the attorney for not paying the balance due to his client until the costs have been taxed, though the balance is admitted, and though it is agreed to

dispense with taxation. ——— v. *Barton*, 2 Chit. 66.

10. An admitted attorney of the Court of *King's Bench* may recover for his fees and disbursements in suing out a commission of bankruptcy, though he has not been admitted a solicitor in *Chancery*. *Wilkinson* v. *Diggles*, 2 Dow. & Ryl. 302. *S. C.* 1 B. & C. 158.

11. Where an attorney is retained jointly by several parties to defend a suit against each, the delivery of a bill to *one* is sufficient to entitle him to maintain a joint action against all for his costs, within the 2 *Geo.* 2, c. 23, s. 23. *Oxenham* v. *Lemon*, 2 Dow. & Ryl. 461.

12. An attorney employing an agent to do business for his client, is primarily liable to such agent for his bill, though the latter knows the business to be done for the client; but to whom the credit is given is a question for the jury. *Scrace* v. *Whittington*, 3 Dow. & Ryl. 195. *S. C.* 2 B. & C. 11.

X. LIEN FOR COSTS.

See *Lomas* v. *Mellor*, 5 Moore 95. Post. tit. SET-OFF.

1. A defendant being sued by bill as an attorney of the Court of *King's Bench*, pleaded by an attorney who had not filed any warrant to defend, and on motion to stay the proceedings in the action (in which the plaintiff was nonsuited) the plaintiff undertook to set off the defendant's costs against a judgment debt due from him to the plaintiff:—Held, that the defendant's attorney or agent had no lien upon such costs for his own costs in defending the suit. *Van Sandau* v. *Burt*, 1 Dow. & Ryl. 168. *S. C.* (not *S. P.*) 5 B. & A. 42.

2. A town agent has no lien for the general balance due to him from a country attorney, upon money of a client of the latter, coming to his hands in a cause in which he acts as such town agent. But *quære* whether he has not a lien for his agency in recovering the money in the particular cause? *Moody* v. *Spencer*, 2 Dow. & Ryl. 6.

3. Where the plaintiff's attorney was indebted to the plaintiff in a sum exceeding the attorney's costs in the cause:—Held, that the agent (to whom the plaintiff's attorney was indebted on a general account in a sum exceeding the amount of the attorney's costs) could not, as against the plaintiff, retain out of the sum recovered by him more than the charge for agency in that particular cause. *White* v. *Royal Exchange Assurance*, 1 Bing. 20.

XI. WHEN AND HOW CHANGED.

1. Where a defendant has appeared and pleaded to an action by one attorney, he cannot make any application to the Court by another in the same cause, unless he has obtained an order for changing his attorney. *Ginders* v. *Moore*, 1 B. & C. 654.

ATTORNMENT.—See Post. tit. REPLEVIN.

AUCTION AND AUCTIONEER.

I. RIGHTS AND PRIVILEGES OF PURCHASER.

See Post. tit. FRAUDS, STATUTE OF.

1. Where the plaintiff, on the sale of a barge by auction under an execution, addressed the company, stating that he had built it for a person against whom the execution was issued, who had not paid him for it; on which no person bid against him, but the auctioneer refused to knock it down to him at his first bidding, when a friend of his made another bidding, and the plaintiff advanced one shilling more, and paid a deposit as part of the purchase-money:

Held, that he did not acquire any property in the barge under such sale. *Fuller* v. *Abrahams*, 6 Moore 316. *S. C.* 3 Brod. & Bing. 116.

II. DUTY, WHEN PAYABLE.

See Post. tit. TRUSTEES.

1. By the acts of parliament passed for building, improving, and maintaining the *Liverpool Docks*, the corporation, (who are trustees for the purpose of carrying them into execution), are authorized to levy certain rates and duties on the ships and vessels entering and going out of the port of *Liverpool*; and they are also empowered to borrow money not exceeding 600,000*l.* for the maintenance of the docks, by sale (by auction) of assignments of the rates and duties so imposed on the shipping, securing to the purchasers 100*l.* each, with interest till paid:—Held, that such assignment was not a mere chattel, but a charge upon the docks, and therefore an interest in land; and consequently that the auctioneer who disposed of such assignments could not be called upon by the excise for the higher duty imposed by the 43 *Geo.* 3, c. 69, *Sched. A*, and 45 *Geo.* 3, c. 30, because they are, as being an interest in land, liable only to the lower duty. *Rex* v. *Winstanley*, 8 Price 180.

III. DUTIES AND LIABILITIES OF AUCTIONEER.

1. By a public act, the *Waterloo Bridge Company* were authorized to raise money for the purpose of completing their undertaking, either among themselves, or by the admission of new members, or by granting annuities for a term of years, or for life:—The act did not contain any provision that the annuities should or should not be redeemable: The company however in the original grant, reserved to themselves a power of redemption: Held, that an auctioneer, putting up to sale one of these annuities, was bound to describe it in his particulars of sale as a redeemable annuity. *Coverley* v. *Burrell*, 5 B. & A. 257.

2. An auctioneer, who delivered goods, without receiving the price from the purchaser, was held liable on a declaration for not giving a full account of the produce of the goods. *Brown* v. *Staton*, 2 Chit. 353.

AWARD.

I. ORDER OF REFERENCE.

See *Steers* v. *Harrop*, 1 Bing. 133. Ante, page 12.

1. If all matters in difference *in the cause* are agreed to be referred to an arbitrator, and the associate by mistake draws up the order of reference generally as to all matters in difference between the parties, it cannot be amended, but they must go down to another trial. *Rawtree* v. *King*, 5 Moore 167.

2. So an order of *Nisi Prius* was refused to be amended according to the terms contained in a paper signed by the counsel at the trial; the intention of the parties appearing from their subsequent acts, to have been in favour of the terms of the order. *Pearman* v. *Carter*, 2 Chit. 29.

3. Agreeing to refer the *quantum* of damages to arbitration, after a question of law has been reserved by the Judge at the trial, does not waive an objection to the defendant's liability in the action, after the arbitrator has made his award. *Oxenham* v. *Lemon*, 2 Dow. & Ryl. 461.

II. SUBMISSION AND REVOCATION.

1. A submission to arbitration, under the statute 9 and 10 *Will.* 3, c. 15, s. 1, may be made a rule of Court in vacation. *In re Taylor*, 5 B. & A. 217.

2. Where the first count of a declaration in covenant by deed to abide by an award,

alleged breaches generally, that the defendant did not on request pay the money awarded, and delayed the arbitrators from making their award so soon as they would have done; and the defendant pleaded to such count, a revocation by deed of the authority of the arbitrators, before they made their award: Held, on demurrer, that this plea was not a confession of the covenant, upon which the plaintiff was entitled to judgment. The second count alleged, "that the defendant did, before the making of the award, hinder and prevent the arbitrators from making their award by executing a deed, whereby he did revoke, &c. the arbitration, and thereby hindered the arbitrators from making their award," &c.: Held on demurrer, that an allegation of notice of the revocation to the arbitrators was not necessary, it being sufficient to aver the fact of revocation by deed to sustain this count, and call upon the defendant to plead issuably. *Marsh* v. *Bulteel*,
1 Dow. & Ryl. 106.
S. C. 2 Chit. 316.
5 B. & A. 507.

3. Where the submission to arbitration has been obtained by fraud, it may be given in evidence under a plea of *non assumpsit*, or *nil debet*. *Sackett* v. *Owen*. 2 Chit. 39.

4. Where a verdict was found for the plaintiff at *Nisi Prius* for the damages in the declaration, subject to the award of an arbitrator, who declined proceeding in the reference: Held, that the plaintiff was entitled to judgment and execution forthwith, unless the defendant would consent to refer the damages to another arbitrator. *Woolley* v. *Clark*,
2 Dow. & Ryl. 158.
S. C. nomine Woolley v. *Kelly*,
1 B. & C. 68.

III. ARBITRATORS, AND UMPIRE.

(a) Their Power and Duty.

1. Where an arbitrator has power to make an application to the Court for enlargement of the time for making his award, he may make several applications, and is not *functus officio* at the expiration of the time granted by the first enlargement. *Anonymous*,
2 Chit. 45.

2. An order of *Nisi Prius*, referring an action of debt on a money-bond, (where the issue was payment by a co-obligor), *and all matters in difference* to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered. *Cayme* v. *Watts*,
3 Dow. & Ryl. 224.

3. If, after reference by bond, one of several of the obligees dies before the award is made, the arbitrators cannot award a payment to the survivors and executors of the deceased, and that they shall release obligors. *Quære*—Whether the award would have been good, if made on the surviving obligees only. *Edmunds* v. *Cox*, 2 Chit. 432.

IV. AWARD.

(a) Where confirmed or set aside.

See Post. tit. STAMPS.

1. An award that money shall be paid to a stranger for the use of one of the parties to a submission, is sufficient. *Snook* v. *Hellyer*, 2 Chit. 43.

2. The Court will not open an award on a suggestion that the arbitrator is mistaken in the law; facts as well as law having been referred to him, and his award being silent as to the grounds of his decision. *Bouttilier* v. *Thick*,
1 Dow. & Ryl. 366.

3. Even where matters of law and not of fact are referred to a barrister, the Court of C. P. will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award itself. *Cramp* v. *Symons*, 1 Bing. 104.

4. An award made by a barrister to whom all matters in difference were referred by an order of *Nisi Prius*, is final between the parties, unless some objection is apparent on the face of it, or misconduct be imputed to the arbitrator. *Sharman* v. *Bell*, 5 M. & S. 504.

5. The Court will not set aside an award on the ground that one of the parties had become bankrupt before it was made. If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs. *Snook* v. *Hellyer*, 2 Chit. 43.

6. Where an action for a breach of covenant was pending, and with all matters in difference, was referred to arbitration, the costs of the suit to abide the event: Held, that an award that the plaintiff had no demand on the defendant, on account of any alleged breaches of covenant, or on any other account whatsoever—was final, although the suit

was not in terms concluded. *Jackson* v. *Yabsley*, 5 B. & A. 848.

7. The Court on motion refused a rule to set aside an award, on the ground that the submission had been obtained by fraud: as the application should have been made to set aside the order. *Sackett* v. *Owen*, 2 Chit. 39.

8. The Court will not entertain an application for setting aside an award, founded upon an indictment at the assizes for not repairing a road, though the question in dispute be of a civil nature. *Rex* v. *Cotesbatch* (*Inhab.*) 2 Dow. & Ryl. 265.

9. Nor will they grant a second rule to set aside an award, when a rule for that purpose has been already discharged. *In re Hellyer*, 2 Chit. 265.

10. Where counsel moved to make a rule absolute, which had been previously obtained to shew cause why an award should not be set aside on the grounds which appeared in the affidavit in support of the motion, on a suggestion that new evidence had been since discovered: Held, that they should have applied to the arbitrator to delay making his award, and appoint another meeting to hear the additional evidence. *Eardley* v. *Otley*, 2 Chit. 42.

11. By an agreement C. and *A.* referred all matters in difference between them to three arbitrators, concerning the value of certain stock and goods, and also as to the sum or sums which each should contribute towards the payment of 2500*l.* and the costs incurred in bringing and defending certain actions in which they were respectively interested. The arbitrators awarded first, that all matters in difference should cease and determine. Secondly, that *A.* should pay to *C.* 444*l.* 2*s.* 2*d.* as his proportion of the sum of 2500*l.* Thirdly, that C. should pay five eighth parts, and that *A.* should pay three eighth parts of the costs of the actions mentioned in the submission. Fourthly, that all such sums as *C.* and *A.* had already expended in respect of the said actions, should be considered as part payment of their respective shares, according to the proportions before mentioned. Fifthly, that the costs of the reference should be paid by C. and *A.* in equal moieties. And sixthly, that upon payment of the 444*l.* 2*s.* 2*d.*, the costs of the actions, and the costs of the reference, in the manner awarded, C. and *A.* should execute mutual releases. On a motion to set aside this award, on the ground that it was *not* final, and void for uncertainty, the Court refused to set it aside, the objections being pleadable to any action brought upon it; but would not grant an attachment for non-performance. *In re Cargey*, 2 Dow. & Ryl. 222.

12. An order of *Nisi Prius*, referring an action of debt on a money-bond, (where the issue was payment by a co-obligor), *and all matters in difference* to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the Court refused to set aside an award directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum judgment and execution should have been taken out, without proof that there were other matters in difference between the parties. *Cayme* v. *Watts*, 3 Dow. & Ryl. 224.

13. If, upon a reference of actions in the Court of C. P. and award of a sum to be paid by each party, the party entitled to the larger sum sues in the Court of K. B. in order to make the defendant's set-off subject to the lien of his attorney for his costs, the former Court will not interfere to enforce the set-off, nor will they order the award to be delivered up. *Symonds* v. *Mills*, 8 Taunt. 526.

14. Where indigo was insured upon a valued policy at and from the loading port to the port of delivery, and the ship was sunk at the former port, in consequence of which the indigo was immersed in salt water, and after survey, was sold by public auction there at a loss of 71*l. per cent.*; and a verdict was found for the assured as for a total loss, subject to a reference to an arbitrator to ascertain the amount of such loss, who awarded a loss of 41*l.* 15*s.* 10*d. per cent.* on the defendant's subscription; the Court of *C. P.* refused to set aside such award, although it appeared that the indigo had been dried by the purchasers at the loading port, and afterwards re-shipped by them in other vessels, and that on its arrival at the port of delivery it produced nearly as much as if it had received no injury whatever. *Hardy* v. *Innes*, 6 Moore 574.

15. Where an action of ejectment was referred to arbitration, and the reference which was confined to that action stated that if the arbitrator should award that the plaintiff had any cause of action, he should have costs, as in a Court of law,

and the arbitrator by his award directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent during the time the defendant held possession, and that the parties should execute general mutual releases:—On a motion for an attachment against the defendant for the sum awarded to the plaintiff: Held, that the award was in that respect good, although the arbitrator did not find in terms that the plaintiff had any cause of action; and also, that if the award were bad as to the direction of mutual releases, that would not vitiate the whole award. *Doe d. Williams* v. *Richardson*, 8 Taunt. 697.

See *Caila* v. *Elgood*, 2 Dow. & Ryl. 193.

Post. tit. Foreign Attachment.

16. But generally speaking, an award which is bad in part, is bad as to the whole. Where therefore, in an award reciting that disputes had lately arisen between the plaintiff and defendants, concerning a roadway claimed by the latter through the mowhay of the former, the arbitrators named in the condition awarded, that all actions, quarrels, &c. depending between the parties for any manner of cause whatever touching the roadway to the date thereof should cease, and be no further prosecuted; and that each of them should pay their own costs concerning the premises: and that the defendant should quit all claim of them to the roadway in dispute, it appearing to them to be the property of the plaintiff; and that the defendants at their own costs should replace the hedge of the mowhay there standing before the defendant's door, as it formerly stood before the dispute; and that they should enjoy the old roadway behind their house; and that they should pay to the plaintiff a certain sum for damage sustained by her on account of the roadway; and that the plaintiff and defendant, on payment of that sum and performance of the award, should execute releases; and the plaintiff averred that the defendant had not paid that sum: Held, on demurrer, that it did not appear from the award that the defendants had any legal title to the road granted to them, it not stating that such road belonged to either of the parties. *Harris* v. *Curnow*, 2 Chit. 594.

17. The Court granted a rule to set aside an award on the application of the party in whose favour it was made, on an affidavit of acknowledgment by the arbitrator and defendant that a sum had been omitted by mistake to be awarded to him. *Anonymous*, 2 Chit. 44.

18. Where, in an action for not repairing, arbitrators made their award upon a view of the premises without calling the parties before them—it was set aside, as other facts might be necessary to be inquired into. *Anonymous*, 2 Chit. 44.

19. An award against trustees and guardians of an infant tenant for life of the realty, who died before the award was made, is not binding. *Bristow* v. *Binns*, 3 Dow. & Ryl. 184.

20. Where a cause was referred to arbitration under a Judge's order, and one of the parties, before the award was published, and before the Judge's order was made a rule of Court, revoked his submission, and the arbitrator made an award notwithstanding such revocation, the Court of *C. P.* set it aside, although the Judge's order had been made a rule of Court before any application to set aside the award was made. *Clapham* v. *Higham*, 1 Bing. 87.

21. By the terms of a reference to arbitration, two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, and to make their award before a certain day, or such time as they or any two of them should appoint. The arbitrators, before appointing an umpire, enlarged the time, and afterwards held a meeting, at which the parties attended:—Held, that they being aware of these facts, and having afterwards attended, could not now make any objection on the ground of the enlargement of the time, having been made before the appointment of the umpire. Notice was given to one of the parties to attend at a meeting, for the purpose of taking instructions for the award, and at that meeting that party did not attend; but the other party did, and was examined privately. On the evidence which he then gave, the amount he was to pay was decreased by the arbitrators: Held, that this private examination of the party in his own favour was incorrect. and that the award must therefore be set aside. *In re Hick*, 8 Taunt. 694.

(*b*) *Performance, how enforced.*

1. Personal knowledge of an award and rule of Court makes the party

liable to an attachment for not performing the award, although he has not been personally served with such award and rule. *In re Bower,* 1 B. & C. 264.

(c) *Pleadings relative to.*

1. The first count of a declaration in covenant for not performing an award, assigned for breach, first, that the defendant did not pay the money awarded; and secondly, as to the second count, that he revoked the power of the arbitrators. Plea to the first count stated a revocation by deed of the authority of the arbitrators before they made their award: Held, on demurrer, as to the first count, that this plea was a sufficient answer to the breach of covenant; and as to the second, that it was sufficient, on the ground that an obligation that the defendant by deed revoked the arbitrator's power, imported an effectual revocation; and therefore, that the arbitrators had notice of revocation. *Marsh* v. *Bultell,* 2 Chit. 316.
S. C. 1 Dow. & Ryl. 106.
5 B. & A. 507.

(d) *Costs, how payable.*

See *Payne* v. *Bailey,* 3 Brod. & Bing. 304.

See also Post. tits. { COSTS. STAMPS.

1. Trustees of an insolvent debtor, by entering into an arbitration-bond, admit that they have assets, and may be directed to pay costs. *Wansborough* v. *Dyer,* 2 Chit. 40.

2. If the submission to a reference mentions nothing respecting costs, the arbitrators have no power to award their own expenses to be paid by either party in particular. *Bell* v. *Belson,* 2 Chit. 157.

3. And where a cause and all matters in difference were referred to an arbitrator, but nothing was said about costs: Held, that the arbitrator had power over the costs of the cause, but not those of the reference. *Firth* v. *Robinson,* 1 B. & C. 277.

4. An award of less than 5*l.* on the reference of a cause brings it within the *London* Court of Conscience Act *Day* v. *Mearns,* 2 Chit. 156.

BAIL.

I. SPECIAL.

(*a*) *How put in and perfected.*

N. B. For Bail in Error, see Post. tit. ERROR.

1. If, in an action at the suit of two plaintiffs, bail be put in as in an action at the suit of one only, such bail may be treated as a nullity. *Anonymous,* 2 Chit. 77.

2. Bail not put in in time, are bound to justify, though not excepted to until twenty days afterwards. *Nunn* v. *Rogers,* 2 Chit. 108.

3. The statute 43 *Geo.* 3, c. 46, s. 2, does not controul the discretion of the Court as to the time for putting in bail. Where therefore, money was paid into Court in lieu of bail, which was not put in and perfected in due time, the Court,

on an affidavit of merits, granted further time to the defendant. *Parker* v. *Turner*, 2 Chit 71.

4. Bail may be taken after final judgment. *Stanton's* bail, 2 Chit. 73.

5. The Court granted a rule *nisi* for an attachment against the sheriff, where the bail was put in by a new attorney without an order for the attorney's being changed. *Anonymous*, 2 Chit. 76.

And see Post. (*e*) 7, 8, next page.

6. Where no bail are put in at the expiration of the rule to bring in the body, bail afterwards put in are bound to justify within four days in a town cause; or six days in a country cause, without being excepted to. *Story's* case, 2 Chit. 82.

(*b*) *Before whom taken.*

1. One of the bail may be taken by affidavit before a Commissioner in the country, and the other before a Commissioner in town. *Mendorf's* bail, 2 Chit. 90.

2. Or before different Commissioners in the country. *Anonymous*. 2 Chit. 91.

3. And the affidavit of justification need not be sworn before the same Commissioner before whom the affidavit of taking bail was sworn. *Bradey* v. *Holt*, 2 Chit. 91.

4. In the Court of *Exchequer*, bail may justify before a single Baron. 8 Price 612.

(*c*) *Recognizance, Pleas to.*

1. A plea to an action on a recognizance of bail, that after &c. the plaintiff entered into an agreement with the principal in the bail-bond, without the privity of the bail, to take from the principal goods to secure the payment of part of the money recovered, and that such goods were consigned to them accordingly: Held bad, on special demurrer, because such agreement, by parol with a person not a party to the cause, cannot be pleaded in bar of such an action, arising on matter of record. *Buttel* v. *Jarrold*, 8 Price 467.

2. So where bail, sued in debt upon a recognizance, pleaded that no *ca. sa.* was duly sued, returned, and filed against the principal, according to the custom and practice of the Court, which required that the writ should lie in the sheriff's office four days before its return: Held, on demurrer, that this was a bad plea. *Cherry* v. *Powell*, 1 Dow. & Ryl. 50.

(*d*) *Justification, when and how taken.*

See *Rex* v. *London* (*Sheriffs*), 1 Dow. & Ryl. 163. Post. tit. Sheriff.

1. Bail who have rendered in their discharge cannot afterwards justify, so as to relieve the defendant from imprisonment, without entering into a fresh bail-piece. *Payne's* bail, 2 Chit. 76.

2. Where a verdict was found for the plaintiff in an action of *crim. con.* in a larger sum than in the Judge's order to hold to bail, the defendant, in order to be bailed out of custody, must justify in such larger sum; but a rule for a new trial being afterwards made absolute, bail were allowed to justify, in the smaller sum. *Dyott* v. *Dunn*, 2 Chit. 72.

3. The *jurat* of an affidavit by a marksman must state that it was understood by him, as well as read over and explained to him. *Allworthy's* bail, 2 Chit. 92.

4. And an affidavit by a marksman must state that the mark was made in the presence of the Commissioner taking it. *Anonymous*. 2 Chit. 92.

And see *Drabble* v. *Denham*. 2 Chit. 92. Post. page 43.

5. In the Court of *Exchequer*, when bail come up to justify in bailable actions exceeding 1000*l.* they need only justify in 1000*l.* beyond the sum sworn to. *Reg. Gen.* M. T. 51 *Geo.* 3, 8 Price 508.

6. The junior Baron in that Court will in future, sit every day during Term, a few minutes before 10 o'clock, for the purpose of taking the justification of bail and motions of course; and all such matters must be then brought on. *Reg. Gen.* M. T. 1 *Geo.* 4, 8 Price 612.

And see *Tomkinson's* bail, 2 Chit. 94.

7. And bail will not be permitted to justify unless they are in attendance, and counsel instructed, by half-past 10 o'clock. *Reg. Gen.* H. T. 1 & 2 *Geo.* 4, 9 Price 57.

(*e*) *Justification, Notice of, When and how given, and Requisites of.*

1. Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be per-

mitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent,) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed; and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected. *Reg. Gen.* H. T. 2 & 3 *Geo.* 4, 5 B. & A. 559. 1 Dow. & Ryl. 196. 2 Chit. 376.

2. Bail being excepted to in vacation, the defendant gave four days' notice of justification for the first day of *Hilary* Term; but, four days before that time, gave notice for justifying added bail: Held, that the latter bail were entitled to justify. *Woodroffe* v. *Oldfield*, 1 Dow. & Ryl. 7.

3. Notice of justification of bail on *mesne process*, added in vacation, need not be given within four days: *Secus* as to bail in error, for they cannot be changed. *Anonymous*, 2 Chit. 84.

4. It is no objection to the notice of justification, that it states that two were added bail, when in point of fact, one only was added. *Anonymous*, 2 Chit. 86.

5. Where one bail only had been rejected on account of insufficiency, and notice was given of adding and justifying another in lieu of the one rejected: Held, that the original notice was a nullity, and that there should have been a fresh notice of putting in and justifying *de novo*, and not of adding bail. *Lewis* v. *Gadderer*, 5 B. & A. 704. *S. C.* 1 Dow. & Ryl. 350.

6. The Court allowed time to justify bail where the notice of justification did not state the addition of one of the bail, but described him, contrary to the fact, as bail of whom notice had before been given, on condition that the defendant should produce an affidavit that the error was accidental. *Atkinson's* bail, 2 Chit. 86.

7. Bail rejected where the notice of justification and the affidavit of notice were served by different attornies, without a rule to change the attorney. *Anonymous*, 2 Chit. 87.

8. But in the case of a prisoner, notice of bail may be given by one attorney, and notice of justification by another. *Crow* v. *Watson*, 2 Chit. 93.

And see *Malpeson's* bail, 2 Chit. 93. Post. next page.

9. Notice of bail as put in before one Judge, when in fact they were put in before another, is irregular, and the Court will not stay the proceedings on the bail-bond. *Kelly* v. *Wrother*, 2 Chit. 109.

10. The plaintiff and defendant's names, in the notice of justification of bail, being transposed, is not a ground of rejecting the bail. *Anonymous*, 2 Chit. 86.

11. Where the notice of bail being put in, named the defendant by his right name "sued by" the wrong name, and the bail-piece described him by the wrong name only, held sufficient. *Anonymous*, 2 Chit. 81.

12. Where bail were described as of *Battle Bridge* in the notice, it was held insufficient. *King's* bail, 2 Chit. 81.

13. Notice of bail residing at *Leeds*, is too general, although the bail had been found to be resident there: but the Court of C. P. allowed time to amend the notice, and make further inquiry as to the sufficiency of the bail. *Baxter's* bail, 6 Moore 44.

14. Notice of bail as residing at *Clapham* is sufficient, if he live in the *Clapham Road*. *Piesse* v. *Gibson*, 6 Moore 332.

15. A notice to justify bail in the *Exchequer* on an equity day, is bad. *Partridge* v. *Rose*, 2 Chit. 84.

16. And that Court would not allow bail to justify, where the notice of justification was signed by a person describing himself as the "defendant's agent," he not being an attorney of such Court, or a clerk in Court. *Walker (Gent.)* v. *Rushbury (Gent.)* 9 Price 118. *S. C.* (not *S. P.*) 9 Price 16. Ante. p. 20.

(*f*) *When and how served.*

1. Service of the notice of justification of bail after ten o'clock at night is bad, though the person on whom it was served read it. *Anonymous*, 2 Chit. 88.

2. Service of the notice of bail, by sticking up a copy in the *King's Bench* office, and putting another under the door of the attorney's office, was held sufficient, where the attorney could not be personally served. *Atkinson* v. *Thompson*, 2 Chit. 81.

3. So notice of justification of bail stuck up in the *King's Bench* office for the plaintiff, an attorney, who had no known place of residence or business, is sufficient. *Anonymous*, 2 Chit. 89.

4. And where the notice was left at a law stationer's, where the plaintiff's attorney's papers were usually left. *Anonymous*, 2 Chit. 82.

5. If an attorney be not at chambers at office hours, service of the notice of justification of bail on a person with whom the attorney's papers were directed to be left, is sufficient. *Thompson's* bail, 2 Chit. 87.

6. But service on the master of a house, in which the attorney had an office, is not sufficient, unless some privity can be shewn to exist between them. *Freeman's* bail, 2 Chit. 88.

7. In the *Exchequer*, notice of justifying bail in person must be served before eleven o'clock of the day on which such notice should be given, except time has been given; and in that case, before three o'clock in the afternoon of the day on which the order to enlarge be granted, and service must be so stated in the affidavit. *Reg. Gen.* T. T. 59 *Geo.* 3, 8 Price 509.

Same rule, K. B. & C. P.

8. And a continuance of notice of bail, where time was not given by the Court, need not be served before three o'clock, as specified in that rule. *Williams* v. *Taylor*, 5 Moore 472.

(g) *Time, when given to justify or amend Proceedings.*

See Post. tit. Error.

Rex v. *London (Sheriff)*, 2 Dow. & Ryl. 463. Post. tit. Sheriff.

1. An affidavit for further time to justify, on the ground that one of the bail cannot attend, must state the consent of the party to become bail, and a belief of his sufficiency. *Hamilton* v. *Dainsford*, 2 Chit. 82.

2. The Court refused to allow time to amend errors in the notice of bail. *Rennell* v. *Atkins*, 2 Chit. 83.

3. One Judge will not interfere with another Judge's order for time to justify bail. *Tomlinson* v. *Harvey*, 2 Chit. 83.

4. In bail by affidavit, the Court refused time to amend a mistake in the *jurat*, occasioned by the error of the Commissioners in the country, unless the defendant produced an affidavit of merits. *Burford* v. *Holloway*, 2 Dow. & Ryl. 362.

5. A rule for further time to justify bail, drawn up as of a wrong day, was held an immaterial error, and they were permitted to justify. *Donaldson's* bail. 2 Chit. 83.

6. A defendant may put in fresh bail where time has been granted to the plaintiff to inquire into the sufficiency of the former bail. *Freeman* v. *Oldham*, 2 Chit. 84.

7. The Court allowed time to justify bail where the notice of justification did not state the addition of the bail, but described him contrary to the fact, as bail of whom notice had before been given;—on condition that the defendant should produce an affidavit that the error was accidental. *Atkinson's* bail, 2 Chit. 86.

8. In bail by affidavit, time was allowed where the two deponents' names were not mentioned in the *jurat*. *Drabble* v. *Derham*, 2 Chit. 92.

9. Notice of bail residing at *Leeds*, is too general, although the bail had been found to be resident there; but the Court of C. P. allowed time to amend the notice, and make further inquiry as to the sufficiency of the bail. *Baxter's* bail, 6 Moore 44.

10. Where bail had been put in by one attorney and attempted to justify by another, time was given to change the attorney regularly. *M'pherson's* bail, 2 Chit. 93

11. The Court granted time to add and justify bail by *habeas corpus*, where one of the bail was so ill as to be unable to attend. *Gaillim* v. *Howes*, 2 Chit. 107.

12. The Court of *Exchequer* gave the defendant necessary time for putting in and justifying bail, where a question of doubt had been raised whether the party was properly held to bail, without prejudice to the plaintiff's proceedings. *Cope* v. *Joseph*, 9 Price 155.

(h) *Opposition, Examination, and Rejection of.*

1. In the Court of *King's Bench* as well as in C. P. a member of the *House of Commons* cannot be allowed to justify as bail, not being liable to the ordinary process of these Courts. *Duncan* v. *Hill*, 1 Dow. & Ryl. 126.

2. A servant in the King's household, liable to be called on to attend the person of his Majesty, cannot justify as bail, for his person cannot be taken in execution. *Anonymous*, 1 Dow. & Ryl. 127. *n.*

3. The sixty sworn clerks of the *Six Clerks' Office*, do not come within the operation of the rule of Court which pro-

hibits the officers of the Court from becoming bail. *Dutton* v. *Welstead*, 2 Chit. 77.

4. A conveyancer engaged in partnership with an attorney of the Court of K. B., and sharing in the general profits of the business of the office, though he did not himself practise as an attorney, was not allowed to justify as bail. —— v. *Yates*, 1 Dow. & Ryl. 9.

5. *Quære*—If a beneficial leaseholder is sufficient bail, where he is neither freeholder nor householder. *Anonymous*, 2 Chit. 96.

6. A freeholder for ninety-nine years was admitted as bail by consent. *Anonymous*, 2 Chit. 96.

7. A copyhold estate in right of the wife is not sufficient property to constitute a person to become bail. *Anonymous*, 2 Chit. 97.

8. It seems that where the Court orders bail to submit their property to inspection, in order to ascertain its sufficiency to enable them to justify, the plaintiff may cause it to be appraised by a broker. *Tudor* v. *Simpkin*, 2 Chit. 80.

9. An affidavit that *A.* and *B.*, and each of them, were worth double the sum sworn to in the affidavit to hold to bail, exclusive of all debts due to any other person, is sufficient. *Hobson's* bail, 2 Chit. 95.

10. The husband of the defendant, who had married after the arrest and before the return of the writ, was allowed to justify as one of the bail. *Salter* v. *Whitefield*, 2 Chit. 94.

11. Bail, though opposed in two actions, must be opposed in each separately. *Anonymous*, 2 Chit 94.

12. Where bail were opposed on the ground that the defendant had been arrested, but no bail-bond had been taken, the writ appearing to have been returnable of a prior Term, the Court allowed the bail to justify. *Crow* v. *Watson*, 2 Chit. 93.

13. It is no objection to the justification of bail, that he was not acquainted with the defendant. *Jameson's* bail, 2 Chit. 97.

14. Nor that the bail had been transported thirty years ago. *Hatfield's* bail, 2 Chit. 98.

15. Nor that the bail were put in by an uncertificated attorney. *Anonymous*, 2 Chit. 98.

16. Where counsel was instructed to oppose bail, who were by mistake allowed to pass without opposition, they were ordered to come up again on another day, and the rule for the allowance in the mean time was stayed. *Addison* v. *Foster*, 2 Chit. 98.

17. Rejection of one bail is a rejection of both. *Lewis* v. *Gadderer*, 1 Dow. & Ryl. 350.

18. Although it is a general rule that where bail had been once rejected and entered in the rejected book, they always remain so, yet, where they had been rejected on a former occasion, merely on the ground of having been indemnified by the defendant's attorney: Held, that the general rule did not apply. —— v. *Hallett*, 1 Dow. & Ryl. 488.

19. One of the bail was ordered to be struck out of the bail-piece on the ground of his having been a material witness in the cause, and another allowed to justify in his stead. *Anonymous*, 2 Chit. 103.

20. Bail rejected on the ground of his being one of the turnkeys of the *King's Bench* prison. *Daly* v. *Brooshoffe*, 5 Moore 72.

21. So on the ground that his children were in the workhouse, and he would not assign a reason. *Anonymous*, 2 Chit. 77.

22. So also for suffering his father to receive parish relief. *Holm* v. *Booth*, 2 Chit. 78.

23. One of the bail having been recently bankrupt, was not permitted to justify, although worth 500*l.* at the time he offered to become bail. *Butler's* bail, 2 Chit. 78.

24. Bail rejected who did not know whether he had been arrested or not during the space of two years. *Newman's* bail, 2 Chit. 95.

25. A person liable upon outstanding dishonoured bills not renewed, or the right of proceeding against him not suspended, cannot justify as bail. *Barnesdall* v. *Stretton*, 2 Chit. 79.

26. The plaintiff and defendant's names in the notice of justification being transposed is not a ground of rejection. *Anonymous*, 2 Chit. 86.

27. Bail rejected where the notice of justification and affidavit of notice were served by different attornies without a rule to change the attorney. *Anonymous*, 2 Chit. 87.

28. If the justification of bail by affidavit be opposed by another affidavit, stating the insolvency of one of the bail, the Court of C. P. will rot allow the matters of the latter affidavit to be answered. *Aylin* v *Fox*. 5 Moore 482.

(*i*) *Opposition, Costs of.*

1. The Court has no power to order the payment of costs of vexatious notices of justifying bail at chambers, before the defendant is permitted to give a fresh notice, where there has been a change of the defendant's attorney. It seems to be otherwise, where the same attorney has acted vexatiously in giving repeated notices. —— v. *Clarke*, 2 Chit. 89.

2. As where an attorney, knowing that bail were insufficient, caused them to be put in and gave notice of justification, the Court compelled him to pay the costs of the opposition. *Blundell* v. *Blundell*, 1 Dow. & Ryl. 142. *S. C.* 5 B. & A. 533.

3. And where a defendant had been removed by *habeas corpus* from *Lincoln Castle* to the *King's Bench* prison, and the plaintiff had been put to the expense of inquiring after six sets of bail, as to one of whom a false description had been given, the Court ordered the defendant's attorney to pay the costs incurred by the plaintiff, although it was sworn that such attorney had no personal knowledge of the misdescription and insufficiency of the bail. 1 Dow. & Ryl. 142

(*k*) *Allowance of.*

1. Although bail justify by consent at chambers, still a rule for the allowance of bail must be served on the plaintiff or his attorney: if not, the plaintiff may take an assignment of the bail-bond. *Lignold* v. *Holding*, 2 Dow. & Ryl. 436. *S. C. nomine Lignold* v. *Lee*, 1 B. & C. 285.

2. Where bail had justified by mistake and without any default of counsel, the allowance was staid and the bail ordered to come up and justify on the following day. *Addison* v. *Foster*, 2 Chit. 98.

3. The sheriff is liable to an attachment for not bringing in the body, if the rule for the allowance of bail be not served in time, although the bail justified after opposition of counsel, in the presence of the plaintiff's attorney. *Rex* v. *Middlesex* (*Sheriff*), 2 Chit. 99.

4. Where it appeared, after bail had justified, that money had been given to one of them for his trouble and loss of time in coming up to justify, the Court would not set aside the allowance, but imposed on the defendant the terms of producing an affidavit of merits, bringing the sum sworn to into Court, and taking short notice of trial. *Wyllie* v. *Jones*, 2 Dow. & Ryl. 253.

5. But where, after bail had been opposed and allowed, it was discovered that one of them had previously been rejected for insufficiency, though he had since become possessed of property, the Court set aside the rule for the allowance. *Pickard* v. *Dobson*, 3 Dow. & Ryl. 5.

6. The Court of C. P. will not discharge the rule for allowance of bail, on account of perjury in one of them, who had sworn on his justification that he was a housekeeper, and a few days before that he was not:—the plaintiff's only remedy is by indictment. *Shee* v. *Abbott*, 5 Moore 321.

(*l*) *How far liable.*

See Post. tits. { SCIRE FACIAS. SHERIFF.
And see Post. DIV. (*n*.)

1. Bail in the Court of *Exchequer* are only liable for the sum sworn to, and costs in the original action; and the costs of proceedings against themselves, where any shall have been taken. *Reg. Gen.* H. T. 38 *Geo.* 3. 8 Price 502.

(*m*) *How discharged by render of Principal.*

See *Payne's* bail, 2 Chit. 76. Ante. page 11.

1. A render may be made by the party himself, and without an attorney. *Nethersole's* bail, 2 Chit. 99.

2. Bail may render their principal at any time before they are actually fixed. *Moorby* v. *Gadge*, 2 Chit. 104.

3. And they are allowed eight days for that purpose; and where the render was made in due time, the Court set aside the proceedings against them, and held that the plaintiff was not entitled to the costs of the writs issued against the bail before the notice of render was given. *Smith* v. *Lewis*, 2 Chit. 100.

4. After final judgment is signed, the original bail may put in fresh bail, for the purpose of rendering the defendant; and it is not necessary that he should be taken to a Judge's chambers, for the purpose of rendering himself in discharge of his bail, unless he desires it. *Davis* v. *Foster*, 2 Chit. 74.

See also *Stanton's* bail, 2 Chit. 73, Ante. page 41.

5. The Court will not grant a rule

to enlarge the time for the bail to render a bankrupt defendant, unless it be sworn that the application was made on behalf of the bail. *Harris* v. *Glossop*, 2 Chit. 101.

(*n*) *Discharge by other means.*

See ARREST. VII. Ante. page 21. *Rex* v. *Middlesex* (*Sheriff*), 1 Dow. & Ryl. 388. Post. tit. SHERIFF.

1. The Court will not enter an *exoneretur* on the bail-piece, on the ground that the principal was a lunatic, and that the marshal had refused to receive him into his custody. *Anderson's* bail, 2 Chit. 104.

2. But bail may apply to enter an *exoneretur*, if the principal has become bankrupt at any time before they are actually fixed; and where the first *scire facias* did not issue until six days after the bankruptcy of the bail, the Court set aside the proceedings which had issued against them, but with costs to be paid by them. *Moorby* v. *Gadge*, 2 Chit. 104.

3. Where the principal became bankrupt, and on the same day that he obtained his certificate, but *before* the rising of the Court, the bail were fixed on *scire facias*:—Held, that the bail had *till* the rising of the Court on that day, before they could be actually fixed; and on payment of costs, the Court ordered an *exoneretur* to be entered on the bail-piece. *Johnson* v. *Lansey*, 2 Dow. & Ryl. 385. *S. C.* 1 B. & C. 247.

4. The Court of C. P. will not order an *exoneretur* to be entered on the bail-piece, on the ground of the defendant's having obtained his certificate in *Ireland;* but will direct an issue, in order to ascertain the circumstances under which the original debt was contracted. *Bamfield* v. *Anderson*, 5 Moore 331.

5. But if a defendant be discharged under an insolvent debtors' act, the Court will order an *exoneretur* to be entered on the bail-piece. ——— v. *Bruce*, 2 Chit. 105.

6. Where one of the King's yeomen of the guard had been arrested in the *Palace Court*, and was there refused to be discharged on filing common bail, and he afterwards removed the cause into the Court of *King's Bench* by a writ of *habeas corpus cum causâ*, and put in and perfected bail upon the *habeas*:—Held, that the bail could not be exonerated, although the defendant might be privileged from arrest. *Sard* v. *Forrest*, 2 Dow. & Ryl. 250. *S. C.* 1 B. & C. 139.

7. Where the principal offered to surrender, but the plaintiff gave him time, and dispensed with the surrender, on an understanding that the bail should continue liable; and they being ignorant that the defendant had offered to surrender, afterwards signed an agreement to continue liable, the principal always declaring himself ready to surrender; but the plaintiff without notice, issued proceedings against the bail, and the principal obtained his certificate under a commission of bankruptcy:—Held, that the bail were discharged. *West* v. *Ashdown*, 1 Bing. 164.

8. Where a declaration was delivered in debt, the *ac etiam* in the writ being in *assumpsit*, the Court of C. P ordered an *exoneretur* to be entered on the bail-piece on the application of the bail. *Maberley* v. *Benton*, 5 Moore 483.

(*o*) *Setting aside and staying Proceedings against.*

See Post. tits. { SCIRE FACIAS. SHERIFF. }

1. In debt on a recognizance of bail taken in C. P. where the plaintiff had recovered in the original action a sum exceeding that sworn to, the Court of K. B. stayed the proceedings against the bail on payment of the debt sworn to, with interest and costs. *Wheelwright* v. *Simons*, 5 M. & S. 511.

2. Proceedings cannot be set aside on the ground that the attorney had not taken out his certificate at the time he sued out the writ. *Welch* v. *Pribble*, 1 Dow. & Ryl. 215.

II. BAIL-BOND, PROCEEDINGS AND PLEADINGS ON.

See also Post. tit. SHERIFF.

1. Affidavits in support of a rule to set aside proceedings by the assignee of a bail-bond, may be entitled in an action on it, or in the original cause. *Kelly* v. *Wrother*, 2 Chit. 109.

2. But in C. P., where the bond had been regularly assigned, they must be entitled in the action on the bail-bond, and not in the original action. *Ham* v. *Philcox*, 1 Bing 142.

3. On a motion for setting aside the proceedings on a bail-bond, bail above

having justified, the affidavit must state that the defendant had a good defence upon the merits: a good defence to the action is not sufficient. *Grottick* v. *Bailey*, 5 B. & A. 703.

4. A plaintiff cannot sue on a bail-bond after ruling the sheriff to bring in the body, as his election is thereby determined. *Blackford* v. *Hawkins*, 1 Bing. 181.

5. It is no ground for cancelling a bail-bond, that the attorney who sued out the writ had neglected to take out his certificate. *Welch* v. *Pribble*, 1 Dow. & Ryl. 215.

6. A rule to stay proceedings on a bail-bond may be obtained the same day that the bail justified. *Shawe* v. *Johnston*, 2 Chit. 108.

7. Where bail are not put in in time, they must justify without exception; and if not justified, the plaintiff may take an assignment of, and proceed upon the bail-bond. *Nunn* v. *Rogers*, 2 Chit. 108.

And see *Bignold* v. *Holding*, 2 Dow. & Ryl. [illegible]. Ante, page 45.

8. The Court will stay the proceedings on a bail-bond without costs, if the notice of render be given before the assignment; but not otherwise. *Anonymous*, 2 Chit. 103.

9. It seems that where bail do not appear to justify on the day mentioned in the notice, but on a subsequent day, according to further notice, and the plaintiff on the morning of the last day takes an assignment of the bail-bond, and sues out process, the proceedings are not premature, although the rule for the allowance of bail be served on the same day. It is not a waiver of the assignment, that the plaintiff attends to oppose the justification of bail. *Edmond* v. [illegible], 9 Price 5.

10. Where a defendant applied to the under-sheriff, before the return of the writ, to surrender himself in discharge of his bail, which he refused to accept, without assigning any reason for so doing, and the day after surrendered himself to the keeper of the county gaol, which was also before the writ was returnable, and the bail-bond was afterwards assigned to the plaintiff; the Court of C. P. ordered the proceedings on it to be stayed, without costs. *Lewis* v. *Davies*, 5 Moore 267.

11. The statute 4 *Anne*, c. 16, s. 20, does not affect the action on the bail-bond, when brought by the sheriff: and he may sue on it in any Court, and is not restricted to that in which the original action is brought; and therefore, on a general demurrer to an action by the sheriff on a bail-bond forfeited, on the ground that the action on such bond appeared by the declaration to have been brought in a different Court from that out of which the original process issued, the Court of *Exchequer* gave judgment for the plaintiff. *Yorke* v. *Ogden*, 8 Price 174.

12. That Court refused to order a bail-bond, on which proceedings had been stayed by order on perfecting bail, to stand as a security for debt and costs, although the plaintiff had lost a trial where the defendant had previously made an offer to the plaintiff, after the bail-bond had been assigned, and proceedings had in consequence of bail not being perfected in time to justify at chambers, to pay the costs of the proceedings on the bond, to plead to the declaration, and take short notice of trial for the next assizes, to which the plaintiff refused to consent; so that he lost the opportunity of going to trial by his own conduct; and a rule to shew cause why an order made at chambers, for staying proceedings, should not be amended, by adding such terms, was discharged with costs. *Walker* v. *Mapowder*, 8 Price 610.

13. In an action on a bail-bond, the return of the writ, on which the defendant in the original action was arrested, must be stated with certainty. *Everett* v. *Tunnard*, 2 Chit. 624.

14. In a declaration of debt on a bail-bond, at the suit of the assignee of the sheriff, it was stated, "that the plaintiff heretofore, to wit on the 21st *July*, sued out of the Court of the *Bench here*, (the said Court being *then* and *now* at *Westminster*,) a writ of *capias ad respondendum*, by which *T. B.* was to answer the plaintiff in a plea of trespass; and also in a certain plea of trespass on the case upon promises." On special demurrer assigning for causes, that the 21st *July* was a day in vacation, and on which no such Court *then* was at *Westminster*: and that the declaration only stated the writ to be to answer the plaintiff in a "plea of trespass," instead of a plea "wherefore with force and arms, &c."—Held, first, as the averment that the Court was sitting on a day in vacation was laid under a *videlicet*, it might

be treated as surplusage; and secondly, that it was unnecessary to set out or refer to the *clausum fregit* of the writ. *Luckett* v. *Plummer*, 5 Moore 538.

15. In a declaration upon a bail-bond against four defendants, one of the plaintiffs sued as administratrix of *J. C. W.* deceased, without making profert of the will; and the declaration in reciting the writ stated, that the sheriff, to whom it was directed, was commanded to take "the said defendant *T. A.* to answer the plaintiffs in a plea of trespass, and *also* to a bill of the plaintiffs against *the said defendants*:"—Held, on special demurrer, first, that the declaration was sufficient, without making profert of the will; but secondly, that it was ill in not clearly shewing against whom the writ was issued, or who was the defendant in the plaintiff's suit on the writ. *Large* v. *Attwood*, 1 Dow. & Ryl. 551.

16. To a plea in an action on a bail-bond at the suit of the assignee of the sheriff, that the assignment of the bond was not stamped before the exhibiting of the plaintiff's bill in the cause; the plaintiff need merely reply, that the assignment was stamped at or before the exhibiting the bill, and conclude his replication to the country. He need not take issue as to the time when the bill was exhibited, nor aver that the assignment was stamped "before the commencement of the suit," if the action thereon be in the *King's Bench*; and if the plaintiff avers that it was stamped at *Westminster*, he may, nevertheless, conclude to the country. *Carter* v. *Yates*, 2 Chit. 533.

17. Where a defendant was arrested, and executed a bail-bond by the initials of his Christian names only, as the acceptor of a bill of exchange, in which his initials only appeared: the Court ordered the bail-bond to be cancelled, but without costs. *Parker* v. *Bent*, 2 Dow. & Ryl. 73.

See also *Taylor* v. *Rutherman*, 6 Moore 264. Ante. page 22.

18. Where a widow was arrested upon a bill of exchange, accepted by her in the name of *W. S. Chatterley*, by which name she had always gone since her husband's death; *W. S.* being the initials of his Christian name: The Court set aside the bail-bond only, on entering a common appearance. *M'Beath* v. *Chatterley*, 2 Dow. & Ryl. 237.

And see *Taylor* v. *Whittaker*, 2 Dow. & Ryl. 225.

19. A *feme covert*, on being arrested, was discharged on filing common bail, though separated from her husband by a divorce *a mensa et thoro*, she having appealed against the sentence of divorce, which appeal was pending at the time she was arrested. *Hookham* v. *Chambers*, 6 Moore 265. *S. C.* 3 Brod. & Bing. 92.

III. IN CRIMINAL CASES.

1. A prisoner brought up on the charge of horse-stealing was admitted to bail. *Rex* v. ———, 2 Chit. 110.

2. A motion to bail a defendant for an assault must be made before a Judge at chambers. *Rex* v. ——, 2 Chit. 110.

3. After defendants have been admitted to bail on a criminal charge, the Court will not, on affidavit of aggravating facts, increase the bail. *Rex* v. *Salter*, 2 Chit. 109.

4. Where a prisoner was convicted of perjury in an inferior jurisdiction, viz. at the *Chester* assizes, and the sentence of transportation was entered on the record as follows: "Whereupon, all and singular the said premises being seen by the said Justices here, and fully understood, it is *therefore ordered*, that he the said *L. K.* be transported to the coast of *New South Wales*, or some one or other of the islands adjacent, for and during the term of seven years, and that he be in mercy, &c." Held, on error brought, that this entry did not amount to a judgment, but was merely an order; and the Court awarded a *procedendo* to the Court below, commanding them to proceed to give the proper judgment; but in the mean time allowed the prisoner to be bailed. *Rex* v. *Kenworthy*, 3 Dow. & Ryl. 173. *S. C.* 1 B. & C. 711.

BAILMENT.

1. The law will imply that a person who hires a horse is bound to provide him with food during the time of such hiring, unless there be an agreement to the contrary. *Handford* v. *Palmer*, 5 Moore 74.

2. Where an order is given previously to the delivery of goods to a bailee, carrier, or other person, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly; a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. *Streeter* v. *Horlock*, 1 Bing. 34.

BANKER.

See Post. tit. PAYMENT.

BANKRUPT.

I. TRADING.

1. A smuggler, dealing in contraband goods, by buying and selling, is a trader within the meaning of the statute 1 *Jac.* 1, c. 15, s. 2; and therefore liable to a commission, although such buying and selling is illegal. *Cobb* v. *Symonds*, 1 Dow. & Ryl. 111. *S. C.* 5 B. & A. 516.

2. A pawnbroker is a broker within the statute 5 *Geo.* 2, c. 30, s. 39; and is consequently subject to the bankrupt laws. *Rawlinson* v. *Pearson*, 5 B. & A. 124.

And see Post. tit. PAWNBROKER.

3. An innkeeper, as such, is not a trader; neither is an innkeeper selling wine and brandy, and other liquors, by the dozen, to customers out of his inn, necessarily a trader. *Willett* v. *Thomas*, 2 Chit. 651.

4. A person who purchases dead horses for his dogs, and sells the skins and bones, does not thereby become a trader, although he might sell such skins at a profit. *Summersett* v. *Jarvis*, 6 Moore 56. *S. C.* 3 Brod. & Bing. 2.

II. ACTS OF BANKRUPTCY.

(*a*) *Beginning to keep House.*

1. A denial by a trader to the collector of church and highway rates, who called for assessments due from him, after he had given a general order to his wife to be denied to all comers, is an act of bankruptcy; and such order is sufficient evidence of a beginning to keep house, with an intent to delay creditors; and a beginning to keep house with such intent constitutes an act of bankruptcy, although no creditor is actually delayed thereby. *Lloyd* v. *Heathcote*, 5 Moore 129.

2. Where a trader ordered his servant to say, if any creditors called, that he was not at home, and he was accordingly denied, but was in bed ill at the time: Held, that it was properly left to the Jury, whether this was a beginning to keep house, with an intent to commit an act of bankruptcy; and that they were warranted in finding that it was. *Lazarus* v. *Waithman*, 5 Moore 313.

3. Where an aged member of a banking firm was arrested on the 20th *May*, at his private dwelling, distant several miles from the house of business, for a partnership debt; and after the sheriff's officer was prevailed upon to withdraw, upon a promise of his executing a bail-bond when required, he reproached his servants for letting such persons into the house, and ordered them not to let any person into the house they did not know, stating that he was afraid of being arrested again:—on the morning of the 21st, the servants did not open the door without ascertaining from the windows what persons required admission, and the outer gate of the house was kept locked; and it further appeared, that on that day he removed from one apartment of the house to another, to avoid being seen by a person who called, whom he supposed to be a creditor:—Held, that he committed an act of bankruptcy on the 21st *May*, within the meaning of the words in the statute 1 *Jac.* 1, c. 15, s. 2, "to the intent *or whereby* his creditors *shall* or *may* be defeated or delayed;" and which are to be read "to the intent his creditors *shall*, or whereby (or that thereby) they *may* be defeated," &c. although no creditor was actually denied. *Harvey* v. *Ramsbottom*, 2 Dow. & Ryl. 142.
S. C. 1 B. & C. 55.

(*b*) *Fraudulent Conveyance.*

1. *A.* and *B.* being in partnership as traders, and in insolvent circumstances, stopped payment on the 15th *February*, 1819, and dissolved their partnership on that day. *A.* being separately possessed of freehold and leasehold estates, conveyed the whole of them on the same day, by indentures of lease and release, to trustees in trust for sale or mortgage, for the purpose of converting such estates into money, it being convenient to *A.* to raise money at an early period. Subsequently, to this conveyance, *A.* and *B.* gave a power of attorney to *C.* & *Co.* to recover all debts which should be due to them, together with full powers for them to act:—Held, that these circumstances did not constitute an act of bankruptcy by *A.* *Berney* v. *Vyner*, 4 Moore 322.

(*c*) *Lying in Prison.*

1. A penalty due to the Crown is a debt within the statute 1 *Jac.* 1, c. 15, s. 2: therefore where a trader lay in prison more than two months, being unable to pay *Exchequer* penalties for smuggling:—Held, that it was an act of bankruptcy. *Cobb* v. *Symonds*, 5 B. & A. 516.
*S. C. (not *S. P.*) 1 Dow. & Ryl. 111.

III. COMMISSION.

See *Oliver* v. *Johnson*, 1 Dow. & Ryl. 560. Post. tit. Costs

(*a*) *How sued out, and Evidence in support of.*

1. Where a commission of bankrupt was issued against a trader, describing him as "a dealer in cattle, and seeking his trade of living by buying and selling," without the words "dealer and chapman;" and at the trial of an action of trespass brought by him against the assignees under the commission, evidence was received of a dealing in hops, and a verdict was found for the defendants as such assignees, which was afterwards set aside, and a new trial granted, on the ground that it might operate as a surprise on the plaintiff: Held, on a second trial, that such evidence was properly admitted, as the words "dealer in cattle" were descriptive of the person only; and that the general statement, that the bankrupt got his living by "buying and selling," was sufficient to admit evidence of any trading whatever. *Hale* v. *Small*, 4 Moore 415.

IV. COMMISSIONERS.

(*a*) *Jurisdiction and Rights of.*

For their powers on the examination of a Bankrupt, see Div. IX. (*a*)

1. Commissioners of bankrupt are not authorized by 5 *Geo.* 2, c. 30, s. 5, to enlarge the time for the disclosure of a bankrupt's estate and effects beyond the time mentioned in the third section

of that statute, still less, for an indefinite or unlimited period. *Claughton* v. *Leigh*,
2 Dow. & Ryl. 831.
S. C. 1 B. & C. 652.

2. Trespass will not lie against Commissioners of bankrupt for committing a witness to prison, for not satisfactorily answering questions put to him when under examination before them touching the estate of a bankrupt, although the questions may appear to the Court to have been satisfactorily answered. *Doswell* v. *Impey*, 2 Dow. & Ryl. 350.
S. C. 1 B. & C. 163.

3. Where a Commissioner took a promissory note from a bankrupt, under whose commission he was acting, for a debt contracted before bankruptcy, the note being dated after the commission issued and before the certificate was signed:—Held, that such security was invalid, and that no action would lie on it. *Haywood* v. *Chambers*,
1 Dow. & Ryl. 411.
S. C. 5 B. & A. 753.

4. *A.* became entitled to a copyhold estate on the death of his mother, to which she had been admitted by copy of Court-roll. Before he could be admitted, he became bankrupt, and shortly afterwards died without admittance. The Commissioners and assignees under the commission executed a bargain and sale to *B.*, the defendant, of the said copyhold estate, to which he was duly admitted: Held, that he took a fee simple conditional at common law; and that the Commissioners had power to execute a valid conveyance of his estate by bargain and sale, pursuant to the statutes 13 *Eliz.* c. 11, s. 7—1 *Jac.* 1, c. 15, s. 17, and 21 *Jac.* 1, c. 19, s. 12, although the bankrupt died before the bargain and sale, and although he never had been admitted tenant of the manor. *Doe d. Spencer* v. *Clark*,
1 Dow. & Ryl. 44.
S. C. 5 B. & A. 458.

V. ASSIGNMENT BY COMMISSIONERS.

(a) *Effect of, on Property of which Bankrupt is reputed Owner.*

1. *A.*, a spirit merchant, sold to *B.*, a wine merchant, several casks of brandy, some of which, at the time of the sale, were in *A.*'s own vaults, and others in the vaults of a warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place, but no notice of it had been given to the warehouse-keeper, with whom some of the casks were deposited. *A.* having become bankrupt while the brandies remained where they were originally deposited:—Held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 *Jac.* 1, c. 19, s. 11. *Knowles* v. *Horsfall*, 5 B. & A. 134.

2. Where a judgment creditor purchased by bill of sale from the sheriff, certain machinery, seized in execution, belonging to his debtor, and after marking the same with the initials of his name, allowed the debtor to retain possession, upon his agreeing to pay a rent for the use of it, and the latter remained in possession until he committed an act of bankruptcy:—Held, that as the change of ownership was not notorious, the assignees were entitled to recover the property in trover, under the 21 *Jac.* 1, c. 19, s. 11, as there was no evidence to go to the Jury that the bankrupt had ever ceased to be the reputed owner. *Lingard* v. *Messiter*,
2 Dow. & Ryl. 495.
S. C. 1 B. & C. 308.

3. The Ship Register Acts 26 *Geo.* 3, c. 60, and 34 *Geo.* 3, c. 68, do not tend to repeal or prevent the operation of the statute 21 *Jac.* 1, c. 19, s. 11, on *British* registered ships: Therefore, where the owner of a ship assigned his interest in her to *J. S.* by deed, who became the registered owner, but by his permission the former owner continued to have the ship in his possession, and exercised all acts of ownership over her, until he became bankrupt:—Held, that the property in the ship passed to the assignees of such owner, although the register was duly indorsed to *J. S.* before the act of bankruptcy. *Monkhouse* v. *Hay*,
4 Moore 549.
S. C. 8 Price 256.

4. *A.* contracted with *B.* to build a ship, and furnish her with every requisite for sea, the price to be paid by four instalments; two to be paid in the pro-

gress of the work, and the others when the vessel was finished and launched. The two first instalments were paid at the respective times stipulated: when the hull was ready for launching, the ship was measured and surveyed with the privity of the builder; and the master, who had been previously appointed, entered into the usual bond for the delivery of the register at the *Custom-house*:—the ship was then registered in the name of the purchaser, and all the requisites of the register acts were complied with. The builder then received the third instalment. Before the ship was launched, the purchaser advertised for freight, and chartered her for a voyage, and hired a crew with the privity of the builder. The ship was not, in fact, launched, as stated in the register, but remained in the builder's yard; and his men were at work upon her until the 3d *July*. From the early part of *June* to the 30th of that month, an apprentice of the master was employed in the ship; and on the 1st *July* his bedding was put on board. On the 30th *June* the builder committed an act of bankruptcy, and on the 8th *July* a commission was issued against him. On the 2d of *July* the purchaser took possession of the vessel whilst she remained on the builder's wharf, and took away a rudder and cordage; and on the 4th she was launched, and afterwards equipped for sea at the purchaser's expense, the fourth instalment remaining unpaid:—Held, that as between the bankrupt and the purchaser there was such a transfer to, and general ownership in the latter, as to exclude the operation of the 21 *Jac.* 1, c. 19, s. 11, and bar an action of trover at the suit of the assignees; but that they were entitled to such portion of the fourth instalment as should remain due after satisfying the expenses of completing the vessel for sea according to the contract, and for which the bankrupt would have had a lien on the vessel. *Woods* v. *Russell*,
1 Dow. & Ryl. 587.
S. C. 5 B. & A. 942.

5. The sole owner of a ship, secretly mortgaged three fourth shares in her to a creditor as a security for a debt, and was allowed by the latter to retain the sole possession, management, and control of her, until he became bankrupt, and though the requisites of the registry acts had been complied with:—Held, that the whole vessel passed to the assignees under the statute 21 *Jac.* 1, c. 19, s. 11; and that trover would lie against the mortgagee, who had taken possession of the ship upon the bankruptcy of the mortgagor. *Kirkley* v. *Hodgson*, 2 Dow. & Ryl. 848.
S. C. 1 B. & C. 588.

VI. ASSIGNEES.

(a) *Rights, Interests, and Liabilities.*

See also Post. tits. { COSTS. SET-OFF.

1. *A.* being indebted to *B.* & *Co.*, who became bankrupts, deposited a promissory note with the defendants as their assignees, and afterwards paid them the amount of the debt due from him to *B.* & *Co.* on which the note was given up: the commission against them was superseded, and another commission issued, under which the defendants were re-appointed assignees. Four months after *A.* had made the payment to them, he became bankrupt on a secret act of bankruptcy previously committed by him:—Held, in an action for money had and received, brought by his assignees against the defendants in their own right, between the superseding the first commission and issuing the second, that they were not entitled to recover the payment made to the latter by *A.*, being protected by the 46 *Geo.* 3, c. 135, s. 1, as the subsequent commission revested those rights in the defendants, which they believed to exist when the payment was made; and as such payment, if made to *B.* & *Co.*, could not have been disturbed, if they had remained solvent. *Davenport* v. *Carter*,
5 Moore 16.

2. Two several banking firms carrying on business respectively in the same country town, were in the habit of exchanging notes and securities with each other, and settling their balances by a prescribed mode. One of the firms became bankrupt, and at the time of the act of bankruptcy each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprised of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly at the house of their agents in *London*, who did not know the situation in which the parties stood:—

Held, that the solvent firm might recover the amount of the notes from the provisional assignee, in an action for money had and received. *Edmeads* v. *Newman*, 2 Dow. & Ryl. 568. *S. C.* 1 B. & C. 418.

3. Where, on a petition to the Vice-Chancellor for a change of assignees, an order was obtained under the statute 5 *Geo.* 2, c. 30, s. 31, directing that a new assignment should be executed to the plaintiff, in which the two former assignees should join, and one of such assignees absconded, and the assignment was executed by the plaintiff, and the other alone:—Held, that the plaintiff could not maintain an action of *assumpsit* for goods sold and delivered in his character of assignee, as an application should have been previously made to the Vice-Chancellor, stating the reason of the nonjoinder of the assignee who had absconded. *Aldritt* v. *Kittridge*, 6 Moore 569.

4. The assignee of a bankrupt brought an action on the statute 9 *Anne*, c. 14, to recover money lost by the bankrupt to the defendants at the game of *rouge et noir*. To prove the loss of the money, the bankrupt who had obtained his certificate, was called as a witness; and in order to render himself competent, he released the assignee of all claim upon the surplus fund, if any: all the creditors who had proved, released the bankrupt from all future claims· and the assignee (who was not a creditor) executed a like release to the bankrupt:—Held, that the assignee's right of action was not destroyed by the release he had executed, inasmuch as it only extended to the bankrupt's future estate. *Carter* v. *Abbott*, 2 Dow. & Ryl. 575. *S. C.* 1 B. & C. 444.

5. A bankrupt proposed, after an act of bankruptcy, to dispose of his lease, which was a beneficial one; but the purchaser refused to take the lease unless five quarters' rent which were in arrear were first paid: after a negotiation between the bankrupt and the landlord, who knew the bankrupt's situation, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises, but the landlord having a right of re-entry:—Held, that the bankrupt's assignee could not recover from the landlord the rent so paid to him, in an action for money had and received. *Mavor* v. *Croome*, 1 Bing. 261.

6. Where a trader committed an act of bankruptcy on the 9th *November*, and the sheriff took his goods in execution on the 15th, and sold them on the 21st *December*, and a commission was issued on the 23d, and an assignment made on the 6th *January* following:—Held, that the assignees might maintain trover against the sheriff, although he had sold before the assignment was made, as the bankrupt's property vested in them by such assignment, from the act of bankruptcy, by relation. *Lazarus* v. *Waithman*, 5 Moore 313.

7. Two partners in trade borrowed a check for 200*l*. from the defendant, for the express purpose of enabling them to liquidate the balance of an account with their bankers; but before the check was presented, they committed an act of bankruptcy, and afterwards returned the check to the defendant, declining to make any use of it:—Held, that the check did not pass to their assignee, so as to enable him to recover the amount of it in trover. *Moore* v. *Bartrup*, 2 Dow. & Ryl. 25. *S. C.* 1 B. & C. 5.

(*b*) *Actions by and against.*

See *Glasier* v. *Eve*, 1 Bing. 209.
Orr v. *Morice*, 6 Moore 347. *S. C.* 1 Brod. & Bing. 139. Post. tit. Evidence.
Summersett v. *Jarvis*, 6 Moore 56. *S. C.* 3 Brod. & Bing. 2. Post. tit. Trover.

1. In general, the assignees of a bankrupt cannot lend; but as they may lend under circumstances by the 5 *Geo.* 2, c. 30, s. 32, counts may be joined for debts due to the bankrupt, and for money lent by the assignees as such. *Richardson* v. *Griffin*, 2 Chit. 325.

2. Goods taken under an execution against *A*., which had been in his possession more than two months before issuing a commission against him, may be considered as his property, under 49 *Geo.* 3, c. 121, s. 2, and may be described as such in a declaration of *assumpsit* by his assignees, on a guarantie given by the defendants to the bankrupt. *Sampson* v. *Burton*, 4 Moore 515.

3. If a person in trade pay a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably believe bankruptcy probable, but not inevitable, at the time he makes such payment, it is fraudulent within the meaning of the bankrupt laws; and if bankruptcy afterwards ensues, the assignees may maintain *assumpsit* for money had and received to their use, against the person to whom such voluntary payment has been made, though the cause of action arises before the actual bankruptcy. Therefore, where *A.* paid *B.* and others his bankers on the 14th *December*, a sum of money which he owed them, as the balance of his account, and on the 15th was arrested and went to prison, and committed an act of bankruptcy by lying there for two months:—Held, that his assignees might recover back the money so paid, though at the time of the payment he did not apprehend bankruptcy. *Poland* v. *Glyn*, 2 Dow. & Ryl. 310.

4. *A.* a foreign merchant, purchased in his own name, but on account and with the money of *B.* a *British* merchant, certain bank shares in the *French* funds. The latter drew bills on *A.*, which he accepted, on the security of such shares standing in his name; and these bills were assigned by *B.* for a valuable consideration to *C.* a *British* subject. Before they became due, *B.* authorised *A.* by letter to sell the bank shares, in order to reimburse himself against the bills. Before the letter arrived, *A.* had stopped payment, and afterwards became bankrupt, and the bills were dishonoured: *B.* also afterwards became bankrupt. *C.*, by process in a foreign country, attached the bank shares still standing in the name of *A.* for the debts due to him on the bills; and the Court there decreed that the bank shares should be sold, and the proceeds should be applied, to pay a debt due from *B.* to *A.*, and afterwards to retire the bills. Under this decree, *C.* received a certain sum of money on account of the bills:—Held, that the assignees of *A.* could not recover such sum back, as money belonging to *B.* *Cazenove* v. *Prevost*, 5 B. & A. 70.

5. *A.* having money due to him from *B.*, who was also indebted to other persons, took a warrant of attorney for the whole amount of the several debts in the usual terms. *A.* afterwards assigned his interest in the warrant of attorney to *C.* for a valuable consideration, who entered up judgment, and took out execution against *B.*'s effects; and the money was levied by the sheriff, who paid it over to *B.*'s assignees, (he becoming bankrupt):—It seems that *assumpsit* for money had and received to his use, would lie at the suit of *C.* against the assignees. *Cooper* v. *Wrench*, 1 Dow. & Ryl. 482.

6. The assignees of a bankrupt having entered into possession of land in the middle of a quarter, which the latter had agreed to take upon a building lease, on the terms of paying the rent half-yearly:—Held, that an action for use and occupation would lie against them for the whole year, although they had not occupied during all the time. *Gibson* v. *Courthorpe*, 1 Dow. & Ryl. 205.

7. Where the assignees of a bankrupt declared as indorsees against the drawer of a bill of exchange, and to prove notice to the latter of the dishonour by the acceptor, produced an agreement between the drawer and *K.*, (an intermediate indorsee,) reciting that the bill in question was, amongst other bills to which the drawer was a party, *overdue*, and was or ought to be in the hands of *K.*:—Held, that the plaintiffs were not bound to prove that they were assignees, though they declared in that character. *Gunson* v. *Metz*, 2 Dow. & Ryl. 334. S. C. (not *S. P.*) 1 B. & C. 193.

8. Where one of two partners, who were country bankers, became bankrupt, and the defendants, being holders of their notes, obtained payment of part of them from the *London* banker, at whose house they were payable, out of the funds in their hands belonging to the country bank, and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm, to give his bill in part satisfaction of his debt, and indorsed and delivered the same to the defendants, in payment of the residue of the notes in their hands, and afterwards became bankrupt and no fraud was stated:—Held, that the assignees could not recover the money so paid to them by the *London* banker, nor the proceeds of the bill. *Harvey* v. *Crickett*, 5 M. & S. 336.

9. *A.* contracted with *B.* to build a ship, and furnish her with every requi-

site for sea, the price to be paid by four instalments; two to be paid in the progress of the work, and the others when the vessel was finished and launched. The two first instalments were paid at the respective times stipulated: when the hull was ready for launching, the ship was measured and surveyed with the privity of the builder; and the master, who had been previously appointed, entered into the usual bond for the delivery of the register at the *Custom House*: the ship was then registered in the name of the purchaser, and all the requisites of the register acts were complied with. The builder then received the third instalment. Before the ship was launched, the purchaser advertised for freight, and chartered her for a voyage, and hired a crew with the privity of the builder. The ship was not, in fact, launched, as stated in the register, but remained in the builder's yard; and his men were at work upon her until the 3d *July*. From the early part of *June* to the 30th of that month, an apprentice of the master was employed in the ship; and on the 1st *July* his bedding was put on board. On the 30th *June*, the builder committed an act of bankruptcy, and on the 8th *July* a commission was issued against him. On the 2d *July*, the purchaser took possession of the vessel whilst she remained in the builder's wharf, and took away a rudder and cordage; and on the 4th she was launched, and afterwards equipped for sea at the purchaser's expense, the fourth instalment remaining unpaid:—Held, that as between the bankrupt and the purchaser there was such a transfer to, and general ownership in the latter, as to exclude the operation of the 21 *Jac.* 1, c. 19, s. 11, and bar an action of trover at the suit of the assignees; but that they were entitled to such portion of the fourth instalment as should remain due after satisfying the expenses of completing the vessel for sea according to the contract, and for which the bankrupt would have had a lien on the vessel. *Woods* v. *Russell*, 1 Dow. & Ryl. 587. *S. C.* 5 B. & A. 942.

10. If a sheriff legally take goods in execution, and the proprietor afterwards becomes bankrupt, and the sheriff sells at one time, after the bankruptcy, enough to satisfy both that and another execution, which being delivered to him after the bankruptcy, was void, the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had received money enough to satisfy the first execution. *Stead* v. *Gascoigne*, 8 Taunt. 527.

VII. RELATION TO ACT OF BANKRUPTCY.

(*a*) *As to Payments made by or on account of Bankrupt.*

See *Mavor* v. *Croome*, 1 Bing. 261. Ante, page 53.

1. Insolvency, within the meaning of the bankrupt laws, does not mean an inability to pay twenty shillings in the pound, when the affairs of a bankrupt shall be ultimately wound up:—but a trader is in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade and business usually do. *Shone* v. *Lucas*, 3 Dow. & Ryl. 218.

2. If a person in trade pay a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably anticipate bankruptcy at the time he makes such payment, it is fraudulent within the meaning of the bankrupt laws; and if bankruptcy afterwards ensues, the assignees may maintain *assumpsit* for money had and received to their use, against the person to whom such voluntary payment has been made, though the cause of action arises before the actual bankruptcy. *Poland* v. *Glyn*, 2 Dow. & Ryl. 310.

3. Where defendants, who had a lien on *C.*'s ship, received from *C.*, then lying in prison, (such imprisonment being the act of bankruptcy,) the balance due to them on account of disbursements made on the ship, and they then delivered up the ship's papers to *C.*, who became bankrupt shortly after this payment; and his assignees sued the defendants for the balance so received by them:—Held, that the assignees' having got possession and disposed of the ship, could not divest the defendants of the money which they might have secured by keeping possession of her. *Thompson* v. *Beatson*, 1 Bing. 145.

4. *A.* had for the purpose of sale, consigned a cargo of fish to *B.*, who was in correspondence and connected with the house of *C.* *C.* had advanced money to *A.* under an engagement from him that the proceeds of the cargo of fish

should be remitted by *B.* to *A.* through the hands of *C.*, in order that they might constitute a security for the money advanced by *C.* *A.* then wrote to *B.*, telling him that the cargo was not responsible for any advances made by *C.* Notwithstanding this, *B.*, after the receipt of *A.*'s letter, remitted the proceeds to *C.*, who retained them to cover his advance. *A.* having become bankrupt, and his assignees having sued *B.* for these proceeds:—Held, that *A.*'s engagement might be deemed an appropriation of the cargo, which he could not rescind, and not a mere order for the payment of money, which could be revoked by a subsequent countermand before payment. *Fisher* v. *Miller*, 1 Bing. 150.

VIII. PROOF OF DEBTS.

Where costs are proveable under a Commission, see *Holding* v. *Impey*, 1 Bing. 189. Post. page 59.

(*a*) *Creditors having Mortgage Security.*

1. Where the mortgagee of a bankrupt's estate called on the Commissioners to direct a sale, under Lord *Loughborough*'s order of *March* 1794, and became the purchaser at such sale: Held, in an action for money paid, brought by the solicitors to the assignees, that he was liable to reimburse them the expenses of advertisements and the Commissioners' fees for their attendance to perfect such sale; although the estate sold was insufficient to cover the sum originally advanced by such mortgagee. *Bowles* v. *Perring*, 5 Moore 290.

(*b*) *Election of Creditors.*

1. The plaintiffs declared on four bills of exchange. The defendant pleaded in bar, that he was indebted to the plaintiffs in divers large sums of money for goods sold; and that for securing to them the said several sums, the defendant, before his bankruptcy, accepted a bill of exchange, drawn by the plaintiffs, for and in payment of one of the said several sums in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums in which he so stood indebted as aforesaid; and that the defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs, being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration:—Held, that the election of the creditor to take the benefit of the commission is confined by the 49 *Geo.* 3, c. 121, s. 14, to the debt actually proved, and does not extend to distinct debts *ejusdem generis* due at the same time. *Harley* v. *Greenwood*, 5 B. & A. 95.

2. Where an attorney, in order to get possession of papers belonging to *A.*, in the hands of *A.*'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that *A.* should enter into a reference: Held, that *A.*, having subsequently become bankrupt for the second time, and without paying fifteen shillings in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 *Geo.* 3, c. 121, s. 14, so as to dispense with the reference. *Ex parte Hughes*, 5 B. & A. 482.

3. *A.* and *B.* having dissolved partnership, an award was made, by which *B.* was directed to pay *A.* a certain sum, and to pay several partnership debts. *B.* gave a warrant of attorney for securing the money awarded, with a stipulation in the defeazance, that if *A.* should be called upon to pay any of the partnership debts, he should be at liberty to enter up judgment. *B.* became bankrupt, and *A.* proved his private debt under the commission, and received a dividend thereon. *A.* was afterwards sued for a partnership debt, and entered into an arrangement with the creditor to pay it by instalments, and then entered up judgment, and took out execution on the warrant of attorney, before *B.* had obtained his certificate: Held, that *A.* was not deprived of his remedy by 49 *Geo.* 3, c. 121, ss. 8 & 14. *Dally* v. *Wolferston*, 3 Dow. & Ryl. 269.

(*c*) *Sureties.*

1. Where *A.*, *B.*, and *C.* entered into a bond to the King, the condition of

which was, that *A.*, as sub-distributor of stamps, should truly account for all stamped vellum which he should receive; and should pay to the Commissioners the duties payable for the same; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches:—and *A.* being indebted to the King in a certain sum became bankrupt, and afterwards obtained his certificate; and a *scire facias* having afterwards issued on the bond, *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same:—Held, in an action brought by the surety to recover these sums from the bankrupt, that *A.* was a person "surety for, or liable for a debt" of the bankrupt, within the meaning of the 49 *Geo. 3, c.* 121, s. 8; and consequently, that the latter was protected by his certificate; and that the general plea of bankruptcy was well pleaded. *Westcott* v. *Hodges*, 5 B. & A. 12.

2. Where *A.* became surety for *B.* for a debt due to C., and after a commission of bankruptcy issued against *B.*, paid part of the debt to *C.*, and obtained from him an indemnity against personal liability for the remainder, the whole of the debt having been proved under the commission by C.: Held, that *A.* might maintain an action of *indebitatus assumpsit* against *B.* for the money so paid, as having been paid to his use, notwithstanding the statute 49 *Geo.* 3, c. 121, s. 8. *Soutten* v. *Soutten*,

1 Dow. & Ryl. 521.
S. C. 5 B. & A. 852.

3. Where *A.* wrote orders to *B.* for the delivery of goods to *C.*, which were accordingly delivered to the latter upon the credit of the former; and the usual credit of the trade was four months, and the bills of parcels were made out in the name of C.; and the period of credit was enlarged from time to time without the knowledge of *A.*; and *C.* becoming bankrupt, *B.* proved the amount of the goods under the commission, which exceeded more than two-fifths of *C.*'s debts, and signed his certificate without any communication with *A.*, who at the time of the bankruptcy was abroad, and did not return to this country until eight years afterwards: Held, that *A.* was still liable as surety for *C.* to *B.* *Langdale* v. *Parry*, 2 Dow. & Ryl. 337.

4. *A.* and *B.* having dissolved partnership, an award was made by which *B.* was directed to pay *A.* a certain sum, and to pay several partnership debts. *B.* gave a warrant of attorney for securing the money awarded, with a stipulation in the defeazance, that if *A.* should be called upon to pay any of the partnership debts, he should be at liberty to enter up judgment:—*B.* became bankrupt, and *A.* proved his private debt under the commission, and received a dividend thereon. *A.* was afterwards sued for a partnership debt, and entered into an arrangement with the creditor to pay it by instalments, and then entered up judgment and took out execution on the warrant of attorney before *B.* had obtained his certificate: Held, that *A.* was not deprived of his remedy by 49 *Geo.* 3, c. 121, s. 8. *Dally* v. *Wolferston*,

3 Dow. & Ryl. 269.

IX. BANKRUPT.

(*a*) *Rights, Examination, and Commitment of.*

See *Peers* v. *Gadderrer*, 2 Dow. & Ryl. 246. *S. C.* 1 B. & C. 116. Post. next page.

1. Where a bankrupt was required by his assignees on his last examination to deliver to them his books of account, which he did: Held, that he must be deemed to have delivered them on compulsion; and it being afterwards found that he was not a trader, and that a commission had improperly issued, that he might support an action of trover against such assignees without any previous demand of such books. *Summersett* v. *Jarvis*, 6 Moore 56.
S. C. 3 Brod. & Bing. 2.

2. Where a bankrupt surrendered to his commission on the 4th *February*, and the Commissioners on his prayer enlarged the time *generally* in writing, for him to make a full discovery of his estate and effects, and verbally fixed the adjournment day for the 1st *April* following; and in the interval, the bankrupt having surrendered in discharge of his bail, was detained at the suit of a creditor; the Court refused to discharge him out of custody, he not being protected from arrest

by the Commissioners' order. *Claughton* v. *Leigh*, 2 Dow. & Ryl. 831. *S. C.* 1 B. & C. 652.

3. The statute 49 *Geo.* 3, c. 121, s. 13, empowers Commissioners of bankrupt to bring before them "every bankrupt being in custody charged in *execution*, at the time of his *last examination*," to be examined by them in the same manner as was theretofore in practice with respect to bankrupts in custody on *mesne* process: Held, that this being a remedial clause, the words "*last examination*" do not mean the last *day* of examination; but that the power of the Commissioners to compel the bankrupt to appear before them extended to every day on which he was to be examined touching the disclosure of his estate and effects. *Spence* v. *Jones*, 1 Dow. & Ryl. 377. *S. C.* 5 B. & A. 705.

4. Where a bankrupt refused to be sworn before the Commissioners, on the ground that his attorney had not arrived:—Held, that their warrant for his commitment, stating generally that he refused to be sworn, was sufficient, without adding the reason assigned by the bankrupt for such refusal:—Held, also, that the warrant committing him "until such time as he shall submit himself to us, or the major part of the said Commissioners by the said commission named and authorized, and take the oath prescribed by law for that purpose, and full answer make to our or their satisfaction to the questions which may be put to him by virtue of the said commission," was sufficient; and that by "the questions which may be put by virtue of the said commission," legal questions must be implied. *Nobes* v. *Mountain*, 3 Brod. & Bing. 233.

5. The Court cannot receive affidavits to explain the conduct of, and the circumstances under which, a person was committed by Commissioners of bankrupt, for not satisfactorily answering questions put to him touching the bankrupt's estate and effects. *In re James*, 2 Chit. 112.

X. CERTIFICATE.

(a) *Effect of, in discharge of Debts.*

See *Westcott* v. *Hodges*, 5 B. & A. 12. *Soutten* v. *Soutten*, 5 B. & A. 852. Post. next page.

1. Where a bond was given under 4 *Geo.* 3, c. 33, s. 1, by a member of parliament, being a trader, and after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson* v. *Campbell*, 5 B. & A. 250.

2. Where, in an action of debt, an assignment of the bail-bond was taken, the defendant not having perfected bail, and an action being brought on the bond, he became bankrupt between plea and verdict, and obtained his certificate after final judgment: Held, that he was discharged from the damages and costs of the latter action, as the debt on the bail-bond was proveable under the commission. *Dimsdale* v. *Eames*, 4 Moore 350.

3. Debt does not lie against a bankrupt on the *reddendum* of a lease for rent, accruing after the Commissioners' assignment;—the lessor's assent to such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate. *Wadham* v. *Marlowe*, 2 Chit. 600.

Quære—If an action of covenant would, in such a case, lie against the bankrupt.

4. The sheriff having levied upon goods which were in the possession of the defendant, who was a bankrupt, paid over the proceeds to the assignees, on their claiming them; and the defendant afterwards again becoming bankrupt, and obtaining his certificate, but not paying fifteen shillings in the pound, (and therefore not protected by 5 *Geo.* 2, c. 30, s. 9,) a second execution issued for the same debt: Held, that the latter execution was regular, without the first writ having been returned. *Priest* v. *Milnes*, 2 Chit. 114.

5. A defendant arrested for a debt, contracted partly before and partly after his bankruptcy and certificate, there being a subsequent promise for the former part, was discharged out of custody on filing common bail. *Peers* v. *Gadderer*, 2 Dow. & Ryl. 240. S. C. 1 B. & C. 116.

6. The Court will not discharge a defendant out of custody on filing common bail, on the ground of his having become bankrupt and obtained his certificate in *Bremen*, where the debt was contracted. *Earlier* v. *Languishe*, 2 Chit. 55.

7. Where an attorney was made bankrupt, and described in the Gazette as a "dealer and chapman," and obtained his certificate; and the plaintiff afterwards arrested him as the acceptor of a bill of exchange, payable before the commission issued; the Court of *C. P.* discharged him on filing common bail, although the plaintiff swore that he did not know the defendant was the person mentioned in the Gazette, and that he intended to dispute the validity of the commission on the ground of fraud.—He should have stated the nature of such fraud, and when he discovered its existence. *Kemp* v. *Neville*, 5 Moore 21.

8. An overseer who has been committed for not delivering his account, and paying over the balance due, may be discharged out of custody, if he has become bankrupt and obtained his certificate, although he became so before the expiration of the year for which he acted. *Rex* v. *Tucker*, 2 Chit. 286. S. C. 5 M. & S. 508.

9. Where *A.* wrote orders to *B.* for the delivery of goods to *C.*, which were accordingly delivered to the latter upon the credit of the former; and the usual credit of the trade was four months, and the bills of parcels were made out in the name of *C*: and the period of the credit was enlarged from time to time without the knowledge of *A.*; and *C.* becoming bankrupt, *B.* proved the amount of the goods under the commission, which exceeded more than two-fifths of *C.*'s debts, and signed his certificate without any communication with *A.*, who at the time of the bankruptcy was abroad, and did not return to this country until eight years afterwards: Held, that *A.* was still liable, as surety for *C.* to *B.* *Langdale* v. *Parry*, 2 Dow. & Ryl. 337.

10. A commission of bankruptcy was sued out against the plaintiff in *April*, and superseded on the 2d *August*; and a second commission was sued out on the 7th of that month on the same act of bankruptcy, under which the plaintiff obtained his certificate; and afterwards sued the defendants, who were Commissioners under the first commission, for an alleged wrongful imprisonment; and they entered up judgment of nonsuit against him in *July*, and afterwards charged him in execution for costs: Held, that the defendants might have proved the amount of such costs under the second commission, and that the plaintiff was entitled to be discharged from it under his certificate. *Holding* v. *Impey*, 1 Bing. 189.

(*b*) *How pleaded, and what may be given in Evidence under.*

See *Westcott* v. *Hodges*, 5 B. & A. 12. Ante page 57.

1. Where the plaintiffs declared on four bills of exchange, and the defendant pleaded in bar, that he was indebted to them in divers large sums of money for goods sold; and that for securing to the plaintiffs the said several sums, the defendant before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, for and in payment of one of the said several sums in which he was so indebted; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums in which he so stood indebted as aforesaid; that the defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission; and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration:—Held, on demurrer, that this plea could not be supported; because the proof of a debt under a commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt. *Harley* v. *Greenwood*, 5 B. & A. 95.

2. Where *A.* became surety for *B.* for a debt due to C., and after a commission of bankruptcy issued against *B.*, paid part of the debt to C., and obtained from him an indemnity against personal liability for the remainder, the whole of the debt having been proved under the commission by *C.*:—Held, that after *B.* had gone to trial upon the general issue, at the sittings after *Michaelmas* Term, having obtained his certificate in the preceding *Trinity* vacation, it was too late to plead his certificate *puis darrein continuance*; and the Court refused to receive such plea on the terms of his paying the costs of the trial, though they

plaintiff had not entered satisfaction on the roll, of the judgment in respect of which he had become liable as surety, until two days before the trial. *Soutten* v. *Soutten*, 1 Dow. & Ryl. 521.
S. C. 5 B. & A. 852.

3. *Quære*—Whether a plea of the plaintiff's bankruptcy since the last continuance is a dilatory plea, or a plea in bar. *Hartley* v. *Dixon*, 2 Chit. 561.

Quære also—If such plea should not set out the proceedings in the bankruptcy specially, and that the plaintiff was a trader.

BARON AND FEME.

I. HUSBAND.

(a) His Liability on Acts of Wife.

1. Where, on the separation of husband and wife, the former by deed absolutely transferred to trustees for the wife certain personal property, no longer to be liable to his interference:—in an action against the husband for a debt subsequently contracted by the wife, the defendant must shew that the trustees gave effect to the deed by taking possession. *Barrett* v. *Booty*, 8 Taunt. 343.

2. Judgment may be entered up against husband and wife on a warrant of attorney given by her *dum sola*. *Hartford* v. *Mattingly*, 2 Chit. 117.

II. WIFE.

(a) Privileges and Incapacities of.

See *Lacon* v. *Higgins*, 1 Dow. and Ryl. N. P. C. 38. Post. tit. MARRIAGE.

See also Post. tit. WARRANT OF ATTORNEY.

1. Where a *feme sole*, after marriage, was admitted tenant of a manor in the north of *England*, of certain premises to her and her heirs, as of her own tenant-right, according to the custom; and afterwards the lord executed a conveyance of the same premises to the husband in fee, and enfranchised the same from all seignory rights to which they were previously liable: it appears that this conveyance, after the death of the husband, had the effect of giving the wife an absolute estate in fee simple in the premises, descendible only upon the heirs *ex parte maternâ*. *Doe d. Neaby* v. *Jackson*, 2 Dow. & Ryl. 514.
S. C. 1 B. & C. 448.

2. On an application to discharge a defendant out of custody on the ground that she is a married woman, it is necessary that that fact should be positively stated in the affidavit:—Therefore, where it was sworn that she was a married woman, as by the certificate annexed will appear, it was held insufficient. *Harvey* v. *Cooke*, 5 B. & A. 747.

3. It is not an objection to an application on the part of a married woman who has been arrested in vacation, to be discharged out of custody, founded on the usual affidavit, that the motion was made late in the Term following the arrest, because such an application does not proceed on a mere irregularity. Nor will the Court of *Exchequer* order a *feme covert* making such an application to pay costs, or impose any terms on her, in ordering her discharge, opposed on an affidavit, stating that she had been carrying on business on her own separate account, and that the action was brought for goods furnished to her in the way of her trade; because the object of the application is matter of right. *Carlisle* v. *Starr*, 9 Price 161.

4. A *feme covert*, on being arrested, was discharged on filing common bail, though separated from her husband by a divorce *à mensa et thoro*, she having appealed against the sentence of divorce, which appeal was pending at the time she was arrested. *Hookham* v. *Chambers*, 6 Moore 255.
S. C. 3 Brod. & Bing. 92.

5. Where husband and wife were arrested for a debt contracted by the latter, *dum sola*, the rule for cancelling the bail-bond given by the wife for irregularity was made absolute, but without costs. *Taylor* v. *Whittaker*, 2 Dow. & Ryl. 225.

6. Where a married woman was arrested as the drawer of a bill of exchange, and had given a bail-bond, the Court ordered it to be delivered up to be cancelled. *Samwell* v. *Jenkins*, 6 Moore 500.

7. Though a wife live separate from her husband, and support her children, and earn a salary for her services, yet the party owing it cannot pay her, after notice from the husband not to do so: and if the employer pay her such salary, the husband may sue him for its amount. *Glover* v. *The Proprietor of Drury Lane Theatre*, 2 Chit. 117.

8. Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the Court refused to quash the writ, though the husband swore that before and at the time of the arrest he was in the actual employment of the ambassador, and in daily attendance upon him in writing despatches and other official documents. *English* v. *Caballero*, 3 Dow. & Ryl. 25.

9. It seems that if a married woman be taken in execution for a debt contracted by her before marriage, she cannot be discharged, although the husband be in custody on *mesne* process in the same suit. At all events, the application for granting or refusing such discharge is in the discretion of the Court. *Chalk* v. *Deacon*, 6 Moore 128.

10. So a married woman who, with her husband is in execution for a debt contracted by her before her coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 *Geo.* 4, c. 119, s. 25. *Ex parte Deacon*, 5 B. & A. 759.

III. HUSBAND AND WIFE.

(a) Pleadings and Evidence in Actions by and against.

1. Where husband and wife were arrested, the latter was discharged out of custody on filing common bail, and the plaintiff having declared against the husband alone:—Held irregular. *Cattarns* v. *Player*, 3 Dow. & Ryl. 247.

2. A misjoinder of action against husband and wife may be taken advantage of on general demurrer. *May* v. *House*, 2 Chit. 697.

3. Where the plaintiff in order to substantiate a demand for goods sold and delivered at the defendant's shop, proved an admission by the wife of the latter, who served therein and carried on the business in his absence, and that she offered to pay their amount if a certain sum was deducted: Held, that there was evidence to presume that the wife acted within the scope of her authority when she made such offer. *Clifford* v. *Burton*, 1 Bing. 199.

BARRATRY. See Post. tit. INSURANCE.

BASTARDS.

ORDER OF FILIATION.

See Post. tit. SESSIONS, *Appeal to*.

1. An order of bastardy made twelve years after the death of the child, whereby the putative father (who had in the mean time absconded) was adjudged to pay two several sums, one for the by-gone maintenance, and the other for the costs, is void: and though the filiating Justices committed the father upon an illegal warrant, from which he was discharged at the next Sessions, still they might afterwards issue a fresh warrant, founded on the original order; but if the case fell within the 49 *Geo.* 3, c. 68, s. 3, as an order unappealed from, the commitment for non-payment of maintenance must be for three months, unless the money was sooner paid. *In re Addis*, 2 Dow. & Ryl. 167. *S. C.* 1 B. & C. 87.

2. And under the 5th section of that statute, the notice of appeal in a matter of bastardy must specify the cause and matter thereof. *Rex* v. *Gloucestershire (Justices)*, 2 Dow. & Ryl. 426.

BATHING.

1. The public at large have no common law-right to bathe in the sea; and as incident thereto, of crossing the shore on foot, or with bathing-machines for that purpose. *Blundell* v. *Catterall*, 5 B. & A. 268.

BENEFIT SOCIETY.—See Post. tit. FRIENDLY SOCIETY.

BILL OF EXCEPTIONS.

1. Where a bill of exceptions has been tendered, the Court will not grant a motion for a new trial unless such bill has been abandoned. *Doe d. Roberts* v. *Roberts*, 2 Chit. 272.

2. Where, on the trial, a bill of exceptions was tendered, but a verdict having been found for the defendant in error, he entered up judgment in the succeeding Term, and the plaintiff in error removed the cause by writ of error, into C. P.; but the parties could not agree as to the terms of such bill, so that a Judge's signature was never obtained: Held, that the plaintiff having waived his bill of exceptions by bringing the writ of error before such bill was signed, it could not be appended to the writ; more than a year having elapsed since the commencement of the suit in error. *Dillon* v. *Doe d. Parker*, 1 Bing. 17.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. REQUISITES OF, AS TO VALIDITY.

(a) *Form.*

See *Barlow* v. *Broadhurst*, 4 Moore 471. Post. tit. STAMPS.

See also *Milne* v. *Graham*, 2 Dow. & Ryl. 293. *S. C.* 1 B. & C. 192. Post. page 66.

1. The member of a country bank signed for himself and partners, notes beginning with the words, "*I promise to pay, &c.*:"—Held, that he made himself severally liable upon the notes, and could not plead in abatement a joint liability with his partners. *Hall* v. *Smith*, 2 Dow. & Ryl. 584. *S. C.* 1 B. & C. 407.

2. An order for the payment of a sum of money, in the event of a certain con-

tingency, cannot be declared upon as a bill of exchange, though accepted by the drawer. *Ralli* v. *Sarell*,
1 Dow. & Ryl. N.P.C. 33.

See also *Sproule* v. *Legge*, 2 Dow. & Ryl. 15. *S. C.* 1 B. & C. 16. Post. page 67.

3. Two unstamped slips of paper with "*I. O. U.* 400*l.*" and "*I. O. U.* 250*l.*" written thereon, are neither promissory notes nor receipts, and therefore may be received in evidence in an action of *assumpsit* for money lent. *Childers* v. *Boulnois*,
1 Dow. & Ryl. N.P.C. 8.

(*b*) *Parties.*

For the liabilities of partners on Bills and Notes, see Post. tit. PARTNERS.

See also *Murray* v. *East India Company*, 5 B. & A. 204. Post. page 66.

1. The statute 4 *Geo.* 3, giving protection to the Bank of *England* against competition, does not prevent merchants from issuing bills short of six months' date, though there be more than six partners in their firm, if really not bankers, and only done for the purpose of commerce. *Wigan* v. *Fowler*,
2 Chit. 128.

(*c*) *Illegality, when it vitiates.*

See *Haywood* v. *Chambers*, 1 Dow. & Ryl 411. *S. C.* 5 B. & A. 753. Post. page 66.

See also Post. tit. INDICTMENT—*Forgery.*

1. A bill of exchange was drawn by a person who was an entire stranger to the acceptor, and to the person for whose benefit it was afterwards accepted:—it was made payable to the drawer, and after being indorsed generally by him, was delivered over, before acceptance, to the person who had prevailed on him to draw it; and by that person given to the party for whose benefit it was ultimately accepted. The bill was afterwards accepted by the drawee, and delivered by him to a person to whom he (the acceptor) had lost money at play, and for that consideration. It then got into the hands of other persons who were partners in trade, and was by them indorsed and paid over to the plaintiffs for a valuable consideration, without notice:—Held to be within the statute 9 *Anne*, c. 14, s. 1, on the ground of the *acceptance* being the act which gives to the bill its validity as a negotiable instrument, and completes its perfection; and that the statute includes acceptances (although the words of the statute are "given, granted, drawn, or entered into,") of bills drawn without *any consideration*: and that therefore the plaintiffs could not recover against the acceptor. *Henderson* v. *Benson*,
8 Price 281.

2. A tradesman, having in the course of business received a banker's check, which had been stolen from the payee, and given the difference to a stranger who presented it in payment of an article purchased, brought *assumpsit* against the drawer for the amount: Held, in the absence of fraud and negligence on his part, that the action was maintainable. *Lee* v. *Newsam*,
2 Dow. & Ryl. N.P.C. 50.

(*d*) *Alteration, Effect of.*

See *Cox* v. *Troy*, 1 Dow. & Ryl. 38. *S. C.* 5 B. & A. 474. Post. next page.

1. A bill of exchange, altered in the date by the son of the payee, at the suggestion of the acceptor, who afterwards accepted it, is unavailable. *Walton* v. *Hastings*, 2 Chit. 121.

2. But a bill altered in date, after acceptance, but before it was put into the indorsee's hands, was held good. *Johnson* v. *Garnett*, 2 Chit. 122.

3. Though a bill be altered by the drawer after its acceptance, with the consent of the plaintiff, the payee, but without the actual assent of the acceptor; and which alteration made the bill payable twenty days later; yet the acceptor is liable, where the bill appeared to be an accommodation bill, and the acceptor agreed to accept any bill drawn by the drawer, which is strong presumptive evidence that the drawer was sufficiently the agent of the acceptor to have authority to make this alteration. *Johnson* v. *Gibb*, 2 Chit. 122.

4. An accommodation bill, altered in its date before negotiation, with the consent of the parties, does not require a new stamp; and therefore, if it be in the hands of a *bonâ fide* holder for valuable consideration, the acceptor who had assented to such alteration before the bill became due, cannot avail himself of such an objection. *Downes* v. *Richardson*,
1 Dow. & Ryl. 332.
S. C. 5 B. & A. 674.

II. TRANSFER.

(*a*) *How and to whom made.*

See *Williamson* v. *Johnson*, 2 Dow. & Ryl. 281. *S. C.* 1 B. & C. 146. Post. page 68.

1. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law. *Downes* v. *Richardson*, 5 B. & A. 674. *S. C.* (not *S. P.*) 1 Dow. and Ryl. 332.

III. ACCEPTANCE.

(*a*) *What shall amount to, and how cancelled.*

See *Downes* v. *Richardson*, 1 Dow. & Ryl. 332. *S. C.* 5 B. & A. 674. Ante, last page.

1. By a letter of credit, merchants in *London* agreed to accept, at *ninety days'* sight, the drafts of a merchant at *Demerara*, on receiving the bills of lading, &c. of certain colonial produce, to be remitted; and added, "On receiving these documents, and *no irregularity appearing*, we shall accept your drafts *at the usual date*, to the extent of 30,000*l.*" In pursuance of this agreement, two several cargoes were remitted in different ships, and shortly afterwards the consignor drew a bill at *six months*, upon the credit of the cargoes remitted; and in the bill directed the same "*to be charged to account as advised*," without specifying to the account of which cargo it was to be placed, and the consignees refusing to accept:—Held, that they were liable, upon their agreement, in damages for not accepting. *Laing* v. *Barclay*, 2 Dow. & Ryl. 530. *S. C.* 1 B. & C. 398.

2. Where a bill of exchange was left for acceptance at the house of a banker, and was in fact accepted; but before delivery to the holder, the acceptance was cancelled: Held, that this was not an acceptance upon which the holder might maintain an action; and that mere acceptance, without delivering the bill accepted, is not sufficient to make the contract binding. *Cox* v. *Troy*, 1 Dow. & Ryl. 38. *S. C.* 5 B. & A. 474.

IV. ACCEPTOR.

(*a*) *How far Liable.*

See *Downes* v. *Richardson*, 1 Dow. & Ryl. 332. Ante, last page.

1. A bill of exchange was accepted, payable at Messrs. *P.* & *Co.*'s bankers, *London*, but was not presented there for payment until some days after it became due: Held, that the acceptor was still liable, no inconvenience having resulted to him from the delay in not presenting the bill at the time of its maturity. *Rhodes* v. *Gent*, 5 B. & A. 244.

2. Where one of two partners in trade had after an act of bankruptcy, accepted a bill of exchange in the name of the firm, without the privity of his co-partner: Held, that in the hands of an innocent indorsee it was an available security. *Lacy* v. *Woolcott*, 2 Dow. & Ryl. 458.

V. PRESENTMENT FOR PAYMENT.

(*a*) *At what Time made.*

See *Murray* v. *King*, 5 B. & A. 165. Post. page 67.
Rhodes v. *Gent*, 5 B. & A. 244. *Suprà.*

1. The presentment of a bill of exchange after the usual hours is sufficient, provided there be somebody at the place, who sees the bill, or gives an answer; otherwise it would not be sufficient. *Henry* v. *Lee*, 2 Chit. 124.

See also *Bynner* v. *Russell*, 1 Bing. 23. Post. page 67.
Hill v. *Heap*, 1 Dow. & Ryl. N.P.C. 57. Post. page 65.

VI. NOTICE OF DISHONOUR.

(*a*) *When necessary, and how and at what time given.*

1. *W.*, a broker, effected the sale of twenty bags of wool for *H.* and *H.*, to *C.* and *P.*, to be paid for by a bill at eight months, accepted by the latter; and in his notice of sale said to the former, "To shew my opinion of this house, for an allowance of one *per cent.* I will guaranty half the amount." *H.* and *H.* confirmed the sale, and informed *W.* that if he could not procure from *C.* and *P.* acceptances of approved houses, (which they would prefer,) that they would take his guarantie for one half the amount on the terms proposed. The wool was delivered to the vendees without the intervention of the broker, and the vendors took the acceptance of the former for the amount of the wool, made payable at a banker's. Before the bill

was at maturity, the vendees became insolvent, and the vendors resorted to the broker upon his guarantie:—Held, that the latter was liable on such guarantie, though the bill had not been presented for payment, and though there was no proof that it would not have been paid, if presented: but supposing it to have been presented and dishonoured, he would not have been entitled to notice of non-payment. *Holborow* v. *Wilkins*,
2 Dow. & Ryl. 59.
S. C. 1 B. & C. 10.

2. The traveller of the plaintiffs, who were tradesmen in *London*, upon receiving a bill of exchange in payment of a debt due to his principals from *A.* at *Derby*, paid it away to *B.* without communicating to his principals the name of the person from whom he received it. *B.* paid it to *C.*, his brother, in *Bedfordshire*, by whom it was paid to his banker. The bill was dishonoured on the 3d *April*; and on the 5th, *C.* received notice of the dishonour; and he, not knowing the parties to the bill, wrote to his brother *B.* for information, who being then at *Edinburgh*, did not receive the letter till the 10th; when notice was sent to the plaintiffs, and received by them on the 13th:—on the 14th they wrote to *C.* for the bill, and received it on the 16th; and by that day's post gave notice to *A.*, the original indorser:—Held, that there were no laches which would discharge his liability as indorser. *Baldwin* v. *Richardson*,
2 Dow. & Ryl. 285.
S. C. 1 B. & C. 245.

3. Notice of the dishonour of a bill in the following terms, "I give you notice, that a bill for, &c. *drawn* by you upon, &c. lies at, &c. dishonoured,"—is not sufficient to sustain an action against the *indorser*, who was not also the drawer. *Beauchamp* v. *Cash*,
1 Dow. & Ryl. N.P.C. 3.

(*b*) *When waived.*

1. Where the assignees of a bankrupt declared as indorsees against the drawer of a bill of exchange, and to prove notice to the latter of the dishonour by the acceptor, produced an agreement between the drawer and *K.* (an intermediate indorsee), reciting that the bill in question was, amongst other bills to which the drawer was a party, *over-due*, and was or ought to be in the hands of *K.*, was evidence to satisfy the averment of due notice of the dishonour to the drawer, though the assignees were no parties to the agreement. *Gunson* v. *Metz*,
2 Dow. & Ryl. 334.
S. C. 1 B. & C. 193.

2. A declaration by the payees against the drawers of a bill of exchange, averred presentment to and non-payment by the drawers, neither of which averments were proved:—Held, that notice to the drawers was waived by proof of an order given by the latter to the drawees, not to pay the bill if presented; but *aliter* as to the fact of presentment, though the payees were informed of such order before the bill became due. *Hill* v. *Heap*,
1 Dow. & Ryl. N.P.C. 57.

VII. DRAWER, LIABILITY OF.

1. Giving time to the acceptor of an accommodation-bill, drawn for his own benefit, discharges the drawer in an action by the indorsee; but it is otherwise, where the action is brought against the person for whom the bill is drawn. *Hill* v. *Read*,
1 Dow. & Ryl. N.P.C. 26.

2. The drawer of a bill of exchange is not discharged, although a *fieri facias* has been sued out against the acceptor on the same bill. *Pole* v. *Ford*,
2 Chit. 125.

3. An agent to a country bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon *London*, drew in his own name for the amount, upon the firm in *London*, the two firms being the same:—Held, that the agent was liable as drawer, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money. *Leadbitter* v. *Farrow*,
5 M. & S. 345.

4. *A.* the payee of a bill of exchange for 87*l.*, having indorsed it to *B.* for a valuable consideration, and the bill being dishonoured, *C.* the acceptor, sent another bill for 126*l.* (which had some time to run) to *A.*, who took up the first bill by means of the second, received the difference in discount, and indorsed the first bill again to *D.*, who sued the drawer before *C.*'s second bill became due:—Held, that taking the

second bill did not amount to giving time and a new credit to the acceptor of the first, so as to discharge the drawer who was no party to the transaction, unless there was evidence of an express *consent* on the part of *A.*, the payee, to give time, and not to sue upon the first bill until the second was at maturity. *Pring* v. *Clarkson,* 2 Dow. & Ryl. 78. *S. C.* 1 B. & C. 14.

VIII. INDORSER, WHERE DISCHARGED.

See *Baldwin* v. *Richardson,* 2 Dow. & Ryl. 285, Ante, last page.

1. A letter written by the holders of a promissory note to the defendant, the indorser, saying, "the maker is not ready to pay, but will be in a week, which is time enough for us," is not giving time so as to discharge the indorser. *Margesson* v. *Goble,* 2 Chit. 364.

IX. ACTION.

For Interest on Bills and Notes, see Post. tit. INTEREST.

(*a*) *When and by whom maintainable.*

See *Cazenove* v. *Prevost,* 5 B. & A. 70. Ante. page 54.

1. Debt lies by the drawer against the acceptor of a bill of exchange, expressed to be for value received in goods. *Priddy* v. *Henbrey,* 3 Dow. & Ryl. 165. *S. C.* 1 B. & C. 674.

2. So debt lies on a bill of exchange, payable to the drawer's own order, at the suit of the first indorsee against such drawer. *Stratton* v. *Hill,* 2 Chit. 126.

3. An action of *assumpsit* may be maintained on a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognized by statute *Murray* v. *East India Company,* 5 B. & A. 204.

4. The defendant being indebted to the plaintiff for goods sold, gave him a bill of exchange, not due, drawn and accepted by two other persons, to a greater amount than the price of the goods; and the plaintiff gave the defendant the difference in money, who indorsed the bill in blank. The plaintiff having lost the bill before it was paid:—Held, that he could not sue the defendant on it, nor recover the price of the goods. *Champion* v. *Terry,* 3 Brod. & Bing. 295.

5. An indorsee of a bill, without notice that a prior action is depending thereon, may, notwithstanding the pendency of such action, commence an action against the same defendant. *Columbies* v. *Slim,* 2 Chit. 637.

6. Where the holder of a bill, which was a security for a debt due from *A. B. C.* and *D.*, indorsed it over and put it into the hands of *B. C.* and *D.*, who settled their accounts with *A.*, saying that the bill had been satisfied by them; *but the bill itself was not produced to, or seen by A. at the time of such settlement*:—Held, that this was no defence to *A.*, in an action by the holder against *A. B. C.* and *D.*, the bill not having been in fact satisfied by the persons to whom it had been indorsed and handed over. *Featherstone* v. *Hunt,* 1 B. & C. 113. *S. C.* 2 Dow. & Ryl. 233.

See also *Brown* v. *Leonard,* 2 Chit. 120. *Wright* v. *Pulham,* Chit. 121. Post. tit. PARTNERS.

7. A bill given for a supposed balance of accounts, to be thereafter settled on an appointed day, which bill was dishonoured by the acceptor (the defendant); and after it was duly indorsed by the drawer to the plaintiff;—the relative situation of debtor and creditor not being created between the drawer and acceptor, the plaintiff cannot maintain an action on it as indorsee. *Verley* v. *Saunders,* 2 Chit. 127.

8. Where a Commissioner of bankrupt took a promissory note from a bankrupt, under whose commission he was acting, for a debt contracted before the bankruptcy; the note being dated after the issuing of the commission, and before the signing of the certificate, and the debt for which the security was given was not proved under the commission:—Held, that no action would lie on the note, as it was an invalid security. *Haywood* v. *Chambers,* 1 Dow. & Ryl. 411. *S. C.* 5 B. & A. 753.

9. A promissory note made in *Scotland* is within the statute 3 & 4 *Anne,* c. 9, and may be sued upon in *England* by the indorsee against the maker. *Milne* v. *Graham,* 2 Dow. & Ryl. 293. *S. C.* 1 B. & C. 19[?].

10. A tradesman having in the course of business received a banker's check, which had been stolen from the payee, and given the difference to a stranger who presented it in payment of an

article purchased, brought an action of *assumpsit* against the drawer for the amount:—Held, in the absence of fraud and negligence on his part, that the action was maintainable. *Lee* v. *Newsam*, 1 Dow. & Ryl. N.P.C. 50.

(*b*) *Pleadings.*

See Post. tit. Release.

And see *Hardcastle* v. *Nettlewood*, 5 B. & A. 93. Post. tit. Set-off.

1. Where the plaintiffs, as indorsees of a bill of exchange, sued the drawer in their own right, and it appeared that the bill had been indorsed to them in blank, before the death of one of the firm, who was a partner with the plaintiffs as bankers:—Held, that the action was well brought, without their describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner. *Secus*:—If the bill had been specially indorsed. *Attwood* v. *Rattenbury*, 6 Moore 579.

2. An order for the payment of a sum of money, in the event of a certain contingency, cannot be declared upon as a bill of exchange, though accepted by the drawee: but if a conditional acceptance is declared upon, it must be set forth specially, with an averment that the condition has been performed. *Ralli* v. *Sarell*, 1 Dow. & Ryl. N.P.C. 33.

3. It is not necessary to set out the date of a bill; its delivery is its date; and it is a sufficient averment of non-payment of a bill accepted by the defendant, payable at *A.* and *B.*'s, to state that it was presented at their house, without shewing that it was presented to him. *Giles* v. *Bourne*, 2 Chit. 300.

4. An averment in a declaration on a bill, that "when it became due, according to the tenor and effect thereof, to wit, on the 31st *March* 1822, it was in due manner, and according to the custom of merchants, presented for payment:"—Held sufficient on special demurrer, assigning for cause that the 31st *March* was on a *Sunday*. *Bynner* v. *Russell*, 1 Bing. 23.

5. The condition of a bond, after reciting that the defendant and *J. S.* had delivered and indorsed to the plaintiff a bill of exchange, drawn by *J. S.* and accepted by *A. B.*, was, that the defendant and *J. S.*, or either of them, their heirs, &c. should pay, or cause to be paid to the plaintiff, his executors, &c., the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due:—Held, in an action on the bond, that it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *J. S.*, or either of them. *Murray* v. *King*, 5 B. & A. 165.

6. Pleas to a declaration on a bill, with counts for goods sold:—First, that part of the consideration of the bill was spirituous liquors, sold at different times in quantities less in value than 20s.;—And secondly, that the plaintiff and defendant had accounted together, and that the latter had given the former a bill of exchange for the amount of the goods mentioned in the common counts, which bill is still outstanding and unsatisfied,—are issuable pleas, and cannot be treated as nullities so as to entitle the plaintiff to sign judgment as for want of a plea. *Gaitskill* v. *Greathead*, 1 Dow & Ryl. 359.

7. A declaration on a promissory note made in *Ireland*, alleging that it was made payable at No. 81, *Dame Street*, *Dublin*, for sterling money, without averring that *Dublin* is in *Ireland*, and that the money for which the note is given is *Irish* currency, is insufficient. *Sproule* v. *Legge*, 2 Dow. & Ryl. 15. *S. C.* 1 B. & C. 16.

(*c*) *Evidence.*

See Post. tit. Indictment, *Forgery*.

Childers v. *Boulnois*, 1 Dow. & Ryl. N.P.C. 8. Ante. page 28.

1. The copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence, without notice to produce such original letter. *Kine* v. *Beaumont* 3 Brod. & Bing. 288.

2. In an action by the payee against the drawer of a bill of exchange, the declaration stated, that the latter drew it at

"*St. Helena*, to wit, at *Westminster*," and did not aver a protest either for non-acceptance or non-payment. On the production of the bill, it was dated at *St. Helena*, and not stamped. On an objection, that it was inadmissible as an inland bill, for want of such stamp, and that the plaintiff had given no evidence of a protest for non-acceptance or non-payment:—Held, that as there was evidence of a subsequent promise by the defendant to pay the amount of the bill, coupled with a letter written by his attorney, offering terms for payment, it was a waiver of these objections, although such attorney swore that such offer was made without prejudice. *Patterson* v. *Becher*, 6 Moore 319.

3. A declaration by an indorsee against the acceptor, averred that the bill had been indorsed to certain persons *trading under the firm of H. and F.; and that they had indorsed the bill by procuration of one J. D.* to *C.* from whom the plaintiff derived title:—It appeared in evidence that the firm of *H.* and *F.* had ceased to exist for ten years prior to the indorsement, but that a new firm of *H. and Co.* had been established; and that *D.*, one of the members thereof, was in the habit of indorsing bills by procuration in the name of *H.* and *F.*, but that all other transactions in trade were carried on in the name of *H. and Co.* only:—Held, that as between an innocent indorsee and the acceptor there was sufficient evidence to satisfy the allegation in the declaration. *Williamson* v. *Johnson*, 2 Dow. & Ryl. 281. *S. C.* 1 B. & C. 146.

4. Where the assignees of a bankrupt declared as indorsees against the drawer of a bill of exchange, and to prove notice to the latter of the dishonour by the acceptor, produced an agreement between the drawer and *K.* (an intermediate indorsee), reciting that the bill in question was, amongst other bills to which the drawer was a party, *over-due*, and was or ought to be in the hands of *K.*, was evidence to satisfy the averment of due notice of dishonour to the drawer, though the assignees were no parties to the agreement. *Gunson* v. *Metz*, 2 Dow. & Ryl. 334. *S. C.* 1 B. & C. 193.

5. If a promissory note made in *Scotland* be sued upon in this country, and there is any difference in the law of the two countries as to the liability of the defendant, it lies upon the latter to prove such difference. *Brown* v. *Gracey*, 1 Dow. & Ryl. N.P.C. 41. *n.*

6. Where a promissory note made abroad was over-due more than twenty years,—*Quære*, Whether a Jury is bound to presume payment, notwithstanding the payee resided abroad during all that time? *Du Belloix* v. *Waterpark* (*Lord*), 1 Dow. & Ryl. 16.

BILLS OF LADING.

1. Where, by a bill of lading, goods were to be delivered "to the defendant, nett proceeds paid to the plaintiff, or to his assigns, he or they paying freight for the said goods as *per* charter-party:"—Held, that the freight was to be paid by the defendant, and that the nett proceeds to be paid the plaintiff were what remained after such freight and other charges had been satisfied. *Thompson* v. *Adam*, 5 Moore 280.

BLACK ACT.

1. An action does not lie upon the Black Act, 9 *Geo.* 1, c. 22, s. 7, against two of the inhabitants of an hundred by name; but must be brought against the inhabitants at large; and this is a valid objection in arrest of judgment. *Jackson* v. *Pearson*, 2 Dow. & Ryl. 439. *S. C.* 1 B. & C. 304.

BLASPHEMY.

1. The statute 53 *Geo.* 3, c. 160, does not alter the common law respecting a blasphemous libel, but only removes the penalties imposed upon persons denying the doctrine of the *Trinity*, by 9 & 10 *Will.* 3, c. 32, and extends to such persons the benefits conferred upon all other protestant dissenters by 1 *Will.* & *Mary*, sess. 1, c. 18. *Rex* v. *Waddington*, 1 B. & C. 26.

BOND.

I. CONSTRUCTION AND OPERATION OF.

1. A subscribing witness to a bond stated, that it was delivered by the obligor as his deed; but that before and at the time of the execution, it was agreed that it should remain in the witness's hands until the death of *A. B.*, and until certain securities were given up; and that the bond was given up to him upon that condition:—Held, that it was a question of fact for the Jury, on the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of *A. B.*, and until the securities were delivered up. *Murray* v. *Stair (Earl)*, 2 B. & C. 82.

II. LIABILITY OF OBLIGOR.

See *Westcott* v. *Hodges*, 5 B. & A. 12.
Ante. page 57.
Hilton v. *Worrall*, 2 Chit. 448.
Post. tit. INSOLVENT DEBTORS.

1. The father of two illegitimate children executed a bond, conditioned for the payment of an annuity of 30*l.* for the support of them and their mother during their *joint* natural lives; or, in case of the death of the children, during the natural life of the mother. One of the children having died:—Held, that the executor of the obligor was liable on the bond for the arrears of the annuity accruing after the death of that child. *James* v. *Tallent*, 1 Dow. & Ryl. 548. *S. C.* 5 B. & A. 889.

2. The condition of a bond, which recited a purchase of an estate from *W.* by the plaintiffs, was to save them and the lands harmless from all manner of mortgages, judgments, extents, executions, and other incumbrances, had and obtained, or thereafter to be had and obtained, by *T. T.* or any other person:—Held to bind the obligor against the wrongful entry of *T. T.*, being particular against the acts of a particular person. *Nash* v. *Palmer*, 5 M. & S. 374.

3. It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davey* v. *Prendergrass*, 5 B. & A. 187. *S. C.* 2 Chit. 336.

4. Under a bond, conditioned that if *F. M.* should duly account for all monies, &c. received by him in the plaintiff's service as a clerk; and also that if the said *F. M.* should embezzle, &c. the plaintiff's property, and should, within three days after proof thereof, repay, &c. the plaintiff the damage sustained by such misbehaviour or misdoing; or in default thereof, if the defendant should, after notice given, make a full recompense to the plaintiff, the bond was to be void:—the plaintiff, in order to render the defendant (the surety) liable for *F. M.*'s not accounting, must give the defendant notice thereof; as by the construction of the condition, the notice must be given for *F. M.*'s not account-

ing, as well as for his embezzling. *Phillips* v. *Fordyce*, 2 Chit. 676.

5. A surety bond by three obligors, for the payment of 1000*l*., worded, "for which payment to be well and faithfully made, we bind ourselves, and *each* of us for himself, for the whole and entire sum of 1000*l*. *each*;"—is a several, and not a joint and several bond, and may be enforced against the obligors severally; and the tearing off the seal of one of the obligors of such a bond by the obligees, does not avoid it as against the others; and if the obligor against whom it is enforced is entitled to contribution, it seems his remedy is in equity only. *Collins* v. *Prosser*, 3 Dow. & Ryl. 112. *S. C.* 1 B. & C. 682.

Same v. *Everett*, 3 Dow. & Ryl. 122.

III. CONSIDERATION, HOW PROVED.

See *Murray* v. *Stair* (*Earl*), 2 B. & C. 82. Ante, last page.

1. A defendant cannot give in evidence illegality in the consideration of a bond, unless he pleads specially. *Harmer* v. *Rowe*, 2 Chit. 334.

IV. WHEN FORFEITED OR DISCHARGED.

See *Harrington* v. *Kloprogge*, 6 Moore 38. (*n*). *S. C.* 2 Chit. 475. Post. tit. OFFICES.

See also *Kipling* v. *Turner*, 5 B. & A. 261, *Infra*.

1. Where a bond was given under 4 *Geo.* 3, c. 33, s. 1, by a member of Parliament, being a trader; and after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given:—Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson* v. *Campbell*, 5 B. & A. 250.

2. A bond given to the *Treasurer* of a *Benefit Society* for the use of the Society, is an available security at common law, though the rules and regulations of the Society have not been exhibited, confirmed, and filed at the Quarter Sessions, in pursuance of the statute 33 *Geo.* 3, c. 54, s. 2. *Jones* v. *Woollam*, 1 Dow. & Ryl. 393. *S. C.* 5 B. & A. 769.

3. A bond by an apothecary, not to set up business within twenty miles of *A.*, is not illegal as being in restraint of trade. *Hayward* v. *Young*, 2 Chit. 407.

4. A bond conditioned to save *A.* harmless from all actions, legal proceedings, and costs, &c., which might be the consequence of *A.*'s delivering over to the defendant a bill of exchange, part of the proceeds whereof a third person was entitled to; is forfeited by a payment over by *A.* to such third person of his share of the proceeds, upon his demanding the same, without his bringing any action; although *A.* give no notice of the payment to the defendant. *Ker* v. *Mitchell*, 2 Chit. 487.

V. PLEADINGS.

(*a*) *On Bonds conditioned for payment and performance of Covenants.*

See *Corbett* v. *Powell*, 1 Dow. & Ryl. 448.

Jones v. *Woollam*, 5 B. & A. 769.

1. It is not necessary, in declaring upon a *post obit* bond, to aver the death of the person upon whose death the money secured by the bond was to become payable. *Murray* v. *Stair* (*Earl*), 2 B. & C. 82.

2. The condition of a bond, after reciting that the defendant and *J. S.* had delivered and indorsed to the plaintiff a bill of exchange, drawn by *J. S.* and accepted by *A. B.*, was, that the defendant and *J. S.*, or either of them, their heirs, &c. should pay, or cause to be paid to the plaintiff, his executors, &c., the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due:—Held, in an action on the bond, that it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *J. S.*, or either of them. *Murray* v. *King*, 5 B. & A. 165.

3. The condition of a bond, after reciting that *A. B.* and *C.* had filed a bill in equity against *D.* and *E.*, was, that the obligee would pay all such costs as the Court of *Chancery* should award to the defendants on the hearing of the cause:—Held, that the death of *E.*, before any costs were awarded, could not be pleaded in discharge of the bond. *Kipling* v. *Turner*, 5 B. & A. 261.

4. A declaration in debt on bond, stated the condition to be for the payment of 500*l*., *on or before the expiration of two years, or upon the recovery of an estate in A. by J. T.*; *and in*

case J. T. should fail in the recovery thereof, upon due proof of his having so failed, the obligation to be void. Plea, that *J. T.* was still alive, and that the estate had not been recovered by him according to the tenor of the condition. Replication, that the plaintiff had not at any time due proof made to him that *J. T.* had failed in the recovery:—Demurrer, that an immaterial fact was put in issue:—Held, that the obligee was entitled to judgment. *Price* v. *Heapy*, 1 Dow. & Ryl. 451.

5. In an action on a bond against a surety, a parol agreement giving time to the principal cannot be pleaded at law as a defence for such surety. *Davey* v. *Prendergrass*, 5 B. & A. 187. *S. C.* 2 Chit. 336.

6. A plea to a declaration on a bond, conditioned, amongst other things, for the payment of 3000*l.*;—that all the sums of money which became due on the bond were paid,—may be replied to generally by a general denial of the words of the plea, without assigning any specific breach. *Turner* v. *M'Namara*, 2 Chit. 697.

7. To debt on bond, the defendant craved oyer: and after reciting a mortgage-deed, which shewed the condition to be for payment of a sum of money on a day specified, according to the tenor of the proviso contained in the indenture, and for the performance of the covenants contained therein, pleaded, that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisoes in the indenture on his part to be performed. The plaintiff, in his replication, took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes, that it should have concluded with a verification, and that no breach of the condition was assigned according to the statute 8 & 9 *Will.* 3, c. 11, s. 8:—Held, that such replication was good, as the only point in issue was the payment of the money, and as the plaintiff had therein denied the whole substance of the defendant's plea. *Durbishire* v. *Butler*, 5 Moore 198.

8. In a declaration on an indemnity bond to "save harmless and keep indemnified *W.* his heirs, &c., and also certain closes, &c. from and against all *actions, suits, claims, and demands whatsoever, both in law and equity*, which should or might be had, made, commenced, or prosecuted by any person or persons claiming any right, title, or demand, in, to, or upon the said closes, &c., as heir-at-law of *H. P.* and others, of and from all costs, charges, and expenses which the said *W.*, &c. should sustain or be put to, for or by reason or means of such actions, suits, claims, and demands, or otherwise howsoever:" to which the breaches assigned were—first, that on, &c. *H. W. P.* "made claim and demand, and claimed to have a right and title of, in, to, and upon the said closes, &c., and entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use;" and secondly, that he "caused and procured, and suffered and permitted one *H. B.*, who then held and enjoyed the said closes, to attorn to him, and to withhold the payment of the rents, issues, and profits;" and thirdly, that certain title-deeds relating to the said closes, &c. were kept, detained, and withholden by one *A. W.*, at the instance and through the means, and by and through the claim and demand of *T. B. W. P.*" &c.:—Held, after the defendant had pleaded over, that those breaches were well assigned on the covenant declared upon. *Fowle* v. *Welch*, 2 Dow. & Ryl. 133. *S. C.* (not *S. P.*) 1 B. & C. 29. And see *Nash* v. *Palmer*, 5 M. & S. 374. Ante, page 69.

VI. EXECUTION, HOW PROVED.

1. Where, in an action of debt on bond, it was sworn that the deponents had learned that the attesting witness kept out of the way to avoid an arrest:—Held, that this was not a sufficient reason for dispensing with the attendance of such subscribing witness, to prove the execution of the bond by the obligor; and evidence of his handwriting having been given *aliunde*, on which the obligee obtained a verdict,—the Court of C. P. ordered a new trial. *Pytt* v. *Griffith*, 6 Moore 538.

VII. BREACHES, WHEN AND HOW SUGGESTED.

See *Fowle* v. *Welch*, 2 Dow. & Ryl. 133. *Supra.*

1. The plaintiff may suggest breaches

under the statute 8 & 9 *Will.* 3, c. 11, s. 8, at the conclusion of his replication. *Humphrey* v. *Rigby*, 2 Chit. 298.

See *Darbishire* v. *Butler*, 5 Moore 198. Ante, last page.

2. A *post obit* bond, upon which a forfeiture has taken place, is not within the statute 8 & 9 *Will.* 3. c. 11 ; and therefore it is not necessary to suggest breaches ; but it seems that such an instrument is within the 4 & 5 *Anne*, c. 15. *Murray* v. *Stair* (*Earl*), 2 B. & C. 82.

VIII. DAMAGES, HOW ASSESSED.

1. A bond was conditioned for the resignation of a living, which the defendant, when requested, refused to resign :—Held, that he being a wrongdoer, the Jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest, nor, in estimating the annual proceeds, to deduct the curate's stipend. *Sondes* (*Lord*) v. *Fletcher*, 5 B. & A. 835.

BRIBERY.

1. The Bribery Act 2 *Geo.* 2, c. 24, s. 7, is to be construed prospectively, and not retrospectively. Where, therefore, a declaration on this statute alleged that the defendant had received a bribe "for giving his vote," and the evidence negatived any promise or agreement for a bribe previous to the election:—Held, that the case was not within the statute, and that the objection was a good ground of nonsuit. *Huntingtower* (*Lord*) v. *Ireland*, 2 Dow. & Ryl. 450.

Same v. *Gardiner*, 1 B. & C. 297.

2. The plaintiff in an action for bribery, on the 11th section of that statute, is bound to proceed without wilful delay; but until the defendant appears to the writ, the question as to the wilfulness of the delay does not arise. Therefore, where the writ sued out was returnable on the first return in *Trinity* Term 1821, and the plaintiff did not proceed to declare till the 1st *June* 1822, and no appearance had been entered for the defendant:—Held, that the proceedings could not be stayed under that section. *Talmash* (*Bart.*) v. *Gardiner*, 1 Dow. & Ryl. 512.

BRIDGES.

1. The Court is reluctant to stay judgment on an indictment for not repairing a bridge; and will not stay it generally, but only till further order; and if the trial of another indictment is not proceeded in with all dispatch, judgment will be given. *Rex* v. *Southampton* (*Inhab.*) 2 Chit. 215.

CANALS.

See also Post. tit. TOLLS.

1. Where, under the *Birmingham* Canal Navigation Act, a reservoir was made over two pieces of land in which the plaintiff and defendant had separate interests, and the Act provided that "it should be lawful for the owner or owners of the lands on which any such reservoir should be made, to let all the water out of such reservoir once in seven years for the purpose of taking the fish therein:"—Held, that the plaintiff and defendant had each a several right of fishing in the water over his own land, and that they were not tenants in common, but that when the reservoir was exhausted, each would be entitled to the fish which might be left aground on his own soil. *Snape* v. *Dobbs*, 1 Bing. 202.

CARRIERS.

I. DUTY AND LIABILITY OF, AND CONSTRUCTION AND OPERATION OF NOTICES TO LIMIT THEIR RESPONSIBILITY.

For the lien of Carriers, see Post. tit. LIEN.
See also Post. tit. STOPPAGE IN TRANSITU.

1. A carrier is bound to deliver a parcel at the place to which it is directed. Where, therefore, a parcel of goods was directed to "*Mr. James Parker, High Street, Oxford,*" who, on being applied to, said that he expected no such parcel, and it was afterwards delivered to a person who called at the defendant's office, claiming it as his, and who paid the carriage for it:—Held, that it was properly left to the Jury, whether under the circumstances, the carrier had been guilty of gross negligence; and they having found that he had, the Court of *C. P.* refused to grant a new trial, which was moved for on the grounds—first, that the plaintiffs had corresponded by letters with the defendant, after the loss, requesting him to apprehend the person to whom the parcel had been delivered as a swindler; secondly, that intimation of the value of the parcel was not given to the defendant at the time it was delivered at his office, according to a notice which was there affixed, limiting his responsibility to 5*l.* except the value of the parcel was specified when delivered; and lastly, that the property in the goods contained in such parcel had passed from the plaintiffs to the consignee. *Duff* v. *Budd*, 6 Moore 469. S. C. 3 Brod. & Bing. 177.

2. A parcel containing property exceeding 5*l.* in value, was delivered to *A.* and *B.* as common carriers, to be carried by their mail-coach, and was accepted by them to be so carried, and was put into the mail, and carried therein a short distance; and was then taken out of the mail by a servant of the carriers, and left to be forwarded by another coach, of which *A.* was one of the proprietors, but *B.* was not, and the parcel was lost; and *A.* and *B.* as such carriers had previously given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless an insurance were paid:—Held, that notwithstanding this notice, they were responsible for the loss of the parcel in question, in consequence of their servant having delivered it to be carried by another coach, of which one of them only was a proprietor. *Garnett* v. *Willan*, 5 B. & A. 53.

3. So, where a paper parcel containing notes of country bankers to the amount of 1300*l.* and addressed to their clerk, in order to conceal the nature of its contents, was delivered to a carrier without any notice of its value, and booked to be carried by the mail; and was accepted by him to be so carried, but was sent by a different coach, and stolen or lost; and the carrier had previously given notice that he would not be answerable for any parcel above 5*l.* in value, if lost or damaged, unless an insurance were paid:—Held, that although no insurance had been paid, the carrier was responsible for the loss. *Sleat* v. *Fagg*, 5 B. & A. 342.

And see *Wright* v. *Snell*, 5 B. & A. 350. Post. tit. LIEN.

II. PLEADINGS AND EVIDENCE.

See Ante, tit. ABATEMENT. I. (*a*) 1. page 1. *Streeter* v. *Horlock*, 1 Bing. 34. Post. tit. VARIANCE.

1. In an action on the case in the *King's Bench* against ten defendants, the plaintiff declared, that before and at the time of the grievances complained of, they were proprietors of a certain stage-coach, for the conveyance of passengers for hire from *A.* to *B.*; and that being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from *A.* to *B.* for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was overset; by means whereof the plaintiff was hurt, and sustained other injuries. A Jury having found a verdict against eight of

the defendants only, and in favour of the other two, and judgment being entered accordingly:—Held, that as the action was founded on a breach of duty, imposed by the custom of the realm, which was a breach of the law; and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the *Exchequer* Chamber in error. *Bretherton* v. *Wood*, (in error,) 6 Moore 141.
S. C. 3 Brod. & Bing. 54.

2. The plaintiffs declared against the defendants on their common law liability as carriers, for the loss of a parcel which the declaration stated that the defendants, for certain hire and reward, undertook to carry from *London*, and deliver safely at *Dover*; and it appearing that the course of dealing between the parties was, for the plaintiffs to pay the defendants an annual sum for the carriage of parcels between *London* and *Dover*, and on the receipt of each parcel the defendants were in the habit of delivering to the plaintiffs a written acknowledgment, stating that they undertook to carry and deliver the same safely, (" fire and robbery excepted ;") and the Jury having found that this was the contract between the parties, though the loss was occasioned by negligence only:—Held a fatal variance. *Latham* v. *Rutley*, 3 Dow. & Ryl. 211.
S. C. 2 B. & C. 20.

CERTIORARI.

I. ON WHOSE APPLICATION GRANTABLE, AND HOW AND AT WHAT TIME OBTAINED.

See Post. tit. FOREIGN ATTACHMENT.

1. In moving for a rule *nisi* for a *certiorari*, it is irregular to entitle the affidavits on which such motion is founded in any cause; and if they are entitled, they cannot be read. *Ex parte Nohro*, 1 B. & C. 267.

2. There must be a rule *nisi* in the first instance for a *certiorari* to remove proceedings of the Commissioners of Sewers. *Anonymous*, 2 Chit. 137.

3. A *certiorari* lies to remove an ejectment from an inferior jurisdiction into the Court of *King's Bench*, and need not be removed by *habeas corpus cum causâ*. *Goodright d. Sadler* v. *Dring*, 2 Dow. & Ryl. 407.
S. C. nomine Doe d. Sadler v. *Dring*, 1 B. & C. 253.

4. A *certiorari* always lies to remove proceedings under penal statutes, unless it is expressly taken away; and an appeal never lies unless it is expressly given by statute. *Rex* v. *Hundred of Cashiobury* (*Justices*), 3 Dow. & Ryl. 35.

5. The Court granted a *certiorari* to remove a conviction where the magistrate rejected the vendee as a witness, to prove that the defendant used the *Winchester* bushel. *Rex* v. ———, 2 Chit. 137.

6. The statute 12 *Geo.* 1, c. 34, s. 3, makes it an offence for clothiers and other manufacturers to pay the wages of their workmen in goods instead of money; and the statute 22 *Geo.* 2, c. 27, creates several new offences, and extends the provisions of the preceding statute to *silk manufacturers*. The 17 *Geo.* 3, c. 56, s. 22, takes away the writ of *certiorari* upon convictions under the 22 *Geo.* 2.—Where therefore, a *silk manufacturer* was convicted under 12 *Geo.* 1, c. 34, s. 3, and 22 *Geo.* 2, c. 27 :—Held, that the six months limited by the statute for bringing the *certiorari*, was to be computed from the time the conviction was affirmed by the Sessions, and not from the time of the conviction by the Justices below. *In re Kaye*, 1 Dow. & Ryl. 436.
S. C. nomine Rex v. *Rogers*, 5 B. & A. 773.

7. A *certiorari* will not lie to remove the record of a judgment obtained against a defendant in the county Palatine of *Durham*, for the purpose of enabling his bail to render him in the Court of *King's Bench*, though he be a prisoner for debt in the custody of the marshal. *Paterson* v. *Reay*, 2 Dow. & Ryl. 177.

8. The Court will not grant a *certiorari* in the first instance, to remove an order for the appointment of overseers for the purpose of having it quashed, on a suggestion that the Justices made the appointment from corrupt and improper motives; the propriety of the appointment being matter of appeal to the Sessions. *Rex* v. *Somersetshire (Justices)*, 1 Dow. & Ryl. 443.

9. Nor will they grant a *certiorari* to remove an indictment against several defendants charged with a misdemeanour, unless they all concur in the application; and it seems that a consent by counsel is not sufficient, unless supported by an affidavit of such consent by the defendants themselves. *Rex* v. *Hunt*, 2 Chit. 130.

10. After conviction and judgment on an indictment at the Quarter Sessions, the Court will not grant a *certiorari* to remove the proceedings for the purpose of having such indictment quashed on motion, for error on the record. *Rex* v. *Penegoes (Inhab.)*, 2 Dow. & Ryl. 209. *S. C.* 1 B. & C. 142.

II. RESTRAINTS ON, BY STATUTE.

See *Rex* v. *Cashiobury (Justices)*, 3 Dow. & Ryl. 35. Ante, last page.

1. A statute taking away a *certiorari* does not take it from the Crown, unless expressly mentioned. *Rex* v. ——, 2 Chit. 136.

2. By 7 and 8 *Will.* 3, c. 6, a summary remedy is given before two Justices for the recovery of small tithes, under the value of 40*s*., (increased to 10*l*. by 53 *Geo.* 3, c. 127, s. 4.) By the seventh section of the former statute, which gives an appeal to the Sessions, the *certiorari* is taken away, "unless the *title* of the tithes should be in question." *Rex* v. *Jeffery*, 2 Dow. & Ryl. 860. *S. C.* (not *S. P.*) 1 B. & C. 604.

3. The statute 12 *Geo.* 1, c. 34, s. 3, makes it an offence for clothiers and other manufacturers to pay the wages of their workmen in goods instead of money; the statute 22 *Geo.* 2, c. 27, creates several new offences, and extends the provisions of the preceding statute to *silk manufacturers*; and the 17 *Geo.* 3, c. 56, s. 22, takes away the *certiorari* upon convictions under the 22 *Geo.* 2.—A *silk manufacturer* having been convicted under 12 *Geo.* 1, c. 34, s. 3, and 22 *Geo.* 2, c. 27:—Held, that he was not deprived of the *certiorari* by force of the 17 *Geo.* 3, c. 56. *In re Kaye*, 1 Dow. & Ryl. 436. *S. C. nomine Rex* v. *Rogers*, 5 B. & A. 773.

4. The statute 13 *Geo.* 3, c. 78, s. 80, prohibits the removal by *certiorari* into the Court of *King's Bench* of any proceedings had in pursuance of that act. Where therefore, an order was made by two Justices, and confirmed by the Sessions for diverting a road, professedly under the authority of, but (as was alleged) without pursuing all the formalities required by the act:—Held, that the *certiorari* was still taken away; and after the proceedings had been in fact removed, the Court quashed the *certiorari*, *quia improvidè emanavit*, and refused to discuss the sufficiency or insufficiency of the order. *Rex* v. *Casson*, 3 Dow. & Ryl. 36.

III. COSTS ON.

1. Where an indictment was removed by *certiorari* at the instance of the defendant, and he was found guilty, the costs of conveying him to gaol, on his receiving sentence of imprisonment, are reasonable costs within the statute 5 & 6 *W. & M.* c. 11, s. 3, to be allowed to the prosecutor on the taxation of costs. *Rex* v. *Gilbie*, 5 M. & S. 520. *S. C.* 2 Chit. 159.

2. The Court granted a rule to refer it to the Master of the Crown Office to tax in favour of the defendant, the costs of a *certiorari*, the record having been withdrawn without notice. *Rex* v. ——, 2 Chit. 159.

3. Where a *certiorari* was issued to remove a cause from the Court of Great Sessions in *Wales*, without any special ground for its issuing, and without any notice having been given to the defendant's attorney, but was not delivered to the Judges of the Court of Great Sessions till the day before the trial would in due course have taken place, and after great expenses for counsels' fees and procuring the attendance of witnesses had been incurred, the Court not only quashed the *certiorari*, and directed a *procedendo* to issue, but ordered that the party who caused such *certiorari* to issue, should pay to the defendant the costs incurred by him in the Court below, together with the costs of the application. *Jones* v. *Davies*, 1 B. & C. 143.

And see *Bulmer* v. *Marshall*, 1 Dow. & Ryl. 537. *S. C.* 5 B. & A. 821. Post. tit. FOREIGN ATTACHMENT.

CHARTER-PARTY OF AFFREIGHTMENT.

WHAT ACTION MAINTAINABLE ON, AND CONSTRUCTION OF COVENANTS IN.

See also Post. tits. { DEMURRAGE. FREIGHT.

1. Where a cargo consisting of oranges had been materially damaged through the improper conduct of the captain, who was also a part-owner of the vessel, and the freighters brought an action on the case against him and his co-partners for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charter-party under seal with the freighters, by which he engaged to convey the cargo to its port of destination; it not appearing from that instrument that he possessed any other character or interest than that of commander or master. *Leslie* v. *Wilson*, 6 Moore 415. *S. C.* 3 Brod. & Bing. 171.

2. The defendant, as owner of a ship, entered into a charter-party with the freighter, by which the former "granted and to freight let," and the latter "hired, and to freight took" the ship, for a voyage out and home. The owner covenanted that the vessel, being well-manned and furnished, as is usual for vessels in the merchant service, the master should receive on board at *London* goods to be sent alongside her there by the freighter, and deliver them from alongside at *Newfoundland* to the agents of the freighter, according to bills of lading; and such cargo having been discharged there, to receive other goods in like manner, and deliver them at *Demerara*; and having discharged the same, should receive other goods there, and deliver them at *London*, agreeably to bills of lading. The owner also agreed that the ship's boats should assist in unloading and loading the cargoes, when required by the freighter, provided no impediment was thereby to be made in carrying on the exclusive duties of the ship:—In consideration whereof, the freighter covenanted to send and take the goods from alongside, and to pay for the freight and hire of the vessel for the voyage 2600*l.* with primage, &c., one quarter part thereof on delivery of the cargo at *Newfoundland*, by good bills at sixty days' sight on *London*, and the remainder by good bills at two months' date from the day of the ship's report inwards at the port of *London*. The voyage was performed, and goods of third persons brought from *Demerara*, under bills of lading deliverable to the consignees, on payment of certain specified freight therein mentioned, which freight the owner received. Bills of exchange for one quarter's freight were drawn on the freighter at *Newfoundland*, which were afterwards accepted and dishonoured by him; and no sum nor bill for the remaining three quarters' freight *per* charter-party were given or tendered to him on the return of the ship:—Held, that taking the whole of the charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner, notwithstanding the words of grant used in its commencement; and that the mere circumstance of his having entered into an agreement with the charterer, as to the mode by which he should be paid for freight, did not divest him of his lien on the cargo for freight; and that it made no difference that he had delivered the homeward cargo to the consignees, and received the freight due upon the bills of lading, which was different from that due upon the charter-party. *Christie* v. *Lewis*, 5 Moore 211.

3. Where the plaintiff by charter-party, dated the 1st *March*, let to the defendant a ship to freight, and by the terms of the charter-party the plaintiff was to carry an out-bound cargo of goods (not prohibited by restraint of prices) from *Liverpool* to *Carolina* in *America*, and to bring back from thence a cargo of rice for the defendant, he paying freight for the same; and the plaintiff cleared out on the 22d *March* from *Liverpool* with a cargo of salt, and on the 22d *May* following arrived at *Carolina*, where the importation of *British* goods was prohibited by an order issued on the 1st *March*, the day the charter-party was dated; and also a further order, prohibiting the exportation of goods to *England*, so that the plaintiff could not unload the salt, or bring back a cargo of rice:—Held, that the plaintiff could not recover for freight homewards, if it could be established in evidence that he knew of the prohibition at the time of the ship's clearance from *Liverpool*. The fact of the plaintiff's having such knowledge must necessarily depend upon the circumstances of the case. *Heslop* v. *Jones*, 2 Chit. 550.

Quære—What will amount to a sufficient abandonment of a voyage between parties to a charter-party? 2 Chit. 550.

4. The discharge of an outward-bound cargo at a particular place is not in general a condition precedent to the providing a return cargo:—Therefore, a freighter who covenants to load a return cargo, must, if he objects to the ship's delay in proceeding to take it on board, make the objection before he loads the cargo, and within a reasonable time, and must not by any act, take to the ship. *Olhsen* v. *Drummond*, 2 Chit. 705.

5. Under a proviso in a charter-party, that "the ship should lie at *New York* for taking on board her cargo, and at *London* for delivering the same, twenty running days in the whole, if not sooner discharged," the ship may be detained for these purposes seventy days at each place. *Stevenson* v. *York*, 2 Chit. 578.

6. By a charter-party to government, for transporting emigrants from this country to the *Cape of Good Hope*, the defendant, a ship-broker, on behalf of the owners, let a vessel to the Commissioners of the Navy, for the space of ——— calendar months certain, and thenceforward until they should give him notice that she was discharged, such notice to be given after her return to *Deptford* or *Portsmouth*; and the Commissioners covenanted to pay freight at the rate of 14*s.* *per* ton *per* calendar month for so long time as the vessel should be continued in his Majesty's service; and that after she had been in such service six months, the defendant should have a bill of imprest for two months' freight more; and after ten months a like bill for two months; and a like bill whenever eight months should be due; and the following memorandum was written in the margin:—"Notwithstanding, it is herein agreed, that the ship shall be discharged at *Deptford* or *Portsmouth*, it is hereby covenanted that she shall be discharged at the *Cape of Good Hope*, when the service will admit of it:"—Held, that under the terms of the charter-party, the voyage was general, and that the ship was chartered for an indefinite period; and that the defendant was only entitled to claim commission as for a voyage of that description, and not for a specific voyage outwards. *Holl* v. *Pinsent*, 6 Moore 228.

CITY LOTTERY.—See Post. tit. LOTTERY.

CLERGY.

1. Where a spiritual person, who in virtue of his office of chaplain of a college held a curacy with a dwelling attached to it, and ceasing to hold that office, retained possession of the dwelling:—Held, that he was not a curate within the meaning of the statute 57 *Geo.* 3, c. 99, s. 67, and might be ejected by a notice to quit forthwith; and that he was not entitled to the three months' notice required to be given by that statute, with the consent of the bishop. *Goodtitle d. Trinity College (Master and Fellows of)* v. *Lee*, 2 Dow. & Ryl. 718.

COGNOVIT.

1. No judgment can be signed upon any *cognovit* without its being first produced to the clerk of the dockets; and after taxation of the costs, filed with him. *Reg. Gen.* H. T. 2 & 3 *Geo.* 4. 5 B. & A. 560. 1 Dow. & Ryl. 471. 2 Chit. 377.

2. The Court of *Exchequer* refused to set aside a judgment entered up on a *cognovit*, and executed by levying the money, on the ground that no process had been actually served on the defendant before he signed the *cognovit*, nor was at that time sued out,—where it appeared that instructions had been

transmitted to the agent of the plaintiffs' attorney in *London* from the country, to issue a *quo minus*, which was afterwards accordingly issued, tested of course, after the date of the *cognovit*. *Wade* v. *Swift*, 8 Price 513.

COMMISSIONERS.

See Ante, tit. BANKRUPT.

Post. tits. { IMPRESSMENT OF SEAMEN. INCLOSURE. SEWERS.

COMMITMENT.

See Ante, tits. { BANKRUPT. BASTARD.

Post. tits. { JUSTICES OF PEACE. POOR,* *Overseers*.

1. A commitment in execution for three months under the *Goldsmiths' Company* Act, 12 *Geo.* 2, for not paying penalties recovered by judgment in an action, cannot be obtained till a *fieri facias* has been ineffectually issued. *Biddle* v. *Ustonson*, 2 Chit. 139.

2. The *House of Commons* having voted the defendant guilty of a breach of their privileges, for publishing a libel upon the House, and having ordered him to be committed to *Newgate* during their pleasure, and the Speaker's warrant being returned into the Court of *King's Bench* upon a *habeas corpus*, sued out by the defendant, the Court refused to discharge him out of custody. *Rex* v. *Hobhouse*, 2 Chit. 207.

3. It is not necessary, on a prisoner's being brought up by *habeas corpus*, that the warrant of commitment should state that the act was feloniously done. It may be a sufficient ground for committing, and not bailing; though the ground would not be sufficient to convict. *Rex* v. *Croker*, 2 Chit. 138.

4. Where a defendant was committed by an Ecclesiastical Judge of appeal for contumacy for non-payment of costs in a cause of appeal and complaint of nullity lately depending in the *Arches Court* of *Canterbury*, and the *significavit* only described the suit to be "*a certain cause of appeal and complaint of nullity*," without shewing that the defendant was committed for a cause within the jurisdiction of the Spiritual Judge:—Held, that the defendant was entitled to be discharged on *habeas corpus*. *Rex* v. *Dugger*, 1 Dow. & Ryl. 460. *S. C.* 5 B. & A. 791.

COMMON.

See also Post. tits. { INCLOSURE. TITHES.

1. The allegation of a right of common for *all* the plaintiff's cattle, *levant* and *couchant*, is supported, although according to the evidence the common is not sufficient to feed all the cattle for any length of time. *Willis* v. *Ward*, 2 Chit. 297.

COMPOSITION DEED.—See Post. tit. INSOLVENT DEBTOR.

CONSPIRACY.—See Post. tit. INDICTMENT.

CONSTABLE.

See *Prestidge* v. *Woodman*, 2 Dow. & Ryl. 43. *S. C.* 1 B. & C. 12.

Ante, tit. Action. IV. (*b*) 2, page 4.

1. A constable seizing a person by the direction of a *Custom House* officer, who had himself no power to seize, is not within the protection of the *Custom House* Act, there being no pretence for asserting that he was acting within the scope of his duty. *Norton* v. *Miller*, 2 Chit. 140.

2. Where constables were directed under a warrant to search for and take black kerseymere cloth, supposed to have been stolen, and they took cloths of a different description and colour, and carried them before a magistrate, refusing at the time they took them to inform the owner whether they acted under a warrant or not:—Held, that they were within the protection of the statute 24 *Geo.* 2, c. 44, s. 8; and therefore, that an action against them ought to have been commenced within six calendar months from the time of such taking; and it seems, that that section applies to all cases of constables acting as such. *Smith* v. *[illegible]*, 5 Moore 322.

3. If a warrant be directed to a constable by name, he may execute it any where within the jurisdiction of the magistrate; but if it is delivered to him by his name of office, he can execute it only in the parish, &c. of which he is a constable. Therefore, where a warrant for levying a rate was directed "to *A. B.* to the constables of the parish of *W.*, and to all others his Majesty's officers whom these may concern;" and a constable of *W.*, in attempting to execute it in the parish of *D.* was assaulted:—Held, that the assault was justifiable. *Rex* v. *Weir*, 2 Dow. & Ryl. 444. *S. C.* 1 B. & C. 288.

4. The office of constable being a burthensome office, the Court of *King's Bench* will not put a person *de facto* elected, and sworn in by the Court-leet, to the expense of shewing by what authority he holds the office, at the relation of a different body of persons claiming the right of election, where those persons do not shew an immemorial custom in their body to elect. *Rex* v. *Lane*, 1 Dow. & Ryl. 76. *S. C.* 5 B. & A. 488.

5. Where a constable apprehended an offender for a misdemeanour committed in his presence in a place of religious worship, and carried him before a magistrate, and was bound over by recognizance with another to prosecute for the offence:—Held, that the expenses attending such prosecution were not monies expended by such constable on account of his township, and that he could not discharge them in his accounts under the statute 18 *Geo.* 3, c. 19, s. 4. *Rex* v. *Seville*, 5 B. & A. 180.

CONVICTION.

GENERAL FORM AND QUALITIES OF.

See the Statute 3 *Geo.* 4, c. 23.

See also Ante. tit. Certiorari.

Post. tits. { Justices of Peace. Game.

1. A conviction, stating an offence to have been committed in the alternative, is bad. *Rex* v. *Sadler*, 2 Chit. 519.

2. A conviction under the 5 *Geo.* 3, c. 14, for killing fish in a private river, without the consent of the owner, should state the offence to have been committed in an inclosed ground. 2 Chit. 519. And see *Rex* v. *Daman*, 1 Chit. 147.

3. The description of an act in a conviction, as having been passed in the 25th year of the King's reign, when in fact the parliament in which the act was passed, was continued by prorogation from the 24th to the 25th year of the reign, is not a misdescription or ground of objection. *Rex* v. *Windsor*, 2 Chit. 513.

4. A conviction on the 24 *Geo.* 3, c. 47, s. 1, which subjects vessels having foreign spirits on board to forfeiture, when found *hovering*, &c. within the limits of a port of this kingdom, must shew on the face of it that the party convicted is a *British* subject, and that the vessel was not proceeding on her voyage, wind and weather permitting, &c. Where, therefore, a conviction stated that "*C. H.* was convicted of having been found on board a vessel subject to forfeiture, for hovering

within the limits of a port of this kingdom, having certain contraband goods on board:—Held bad. *Ex parte Hawkins*, 3 Dow. & Ryl. 209.
S. C. 2 B. & C. 31.

5. In a conviction under the Hawkers' Act, 25 *Geo.* 3, c. 78, (now repealed,) against a party for travelling about from town to town, and selling goods by retail there, the places of sale not being his usual place of abode, the conviction should specify the goods sold. *Rex* v. *Selway*, 2 Chit. 522.

6. The statute 39 and 40 *Geo.* 3, c. 106, s. 4, enacts, that all persons who shall attend any meeting had or held "for the purpose" of making or entering into any contract, &c. *by that act declared to be illegal*, or of entering into, &c. any combination *for any purpose* declared by that act to be illegal, &c.: Held, that a conviction for attending a meeting "for the purpose" of carrying on a combination "for the purpose" of obtaining an advance of wages, correctly described the offence by the words "for the purpose," though the description of the offence referred to in the fourth section was described in the third section to be "any combination *to obtain*," the words "for the purpose" and "*to obtain*" being synonimous. *Rex* v. *Ridgway*, 1 Dow. & Ryl. 132.
S. C. 5 B. & A. 527.

7. The statute 57 *Geo.* 3, c. 87, s. 5, enacts, that when any person offending against the same, or any other act relating to the Customs or Excise, shall be arrested, he is to be conveyed before one or more Justices of the Peace, "*residing near to the port or place into which the smuggling vessel is carried, or near to the place where any such person shall be so taken or arrested.*" Where two persons were found and apprehended on board a smuggling boat, under this act, whilst afloat in the harbour of *F.*, which had an exclusive local jurisdiction, and after being taken on shore and detained two days there, were carried on board again and conveyed to the port of *D.*, where they were convicted by two Justices of that town, pursuant to the statutes 45 *Geo.* 3, c. 12, s. 7; 57 *Geo.* 3, c. 87, and 3 *Geo.* 4, c. 110,—it seems that such conviction was illegal. *Ex parte Kite*, 2 Dow. & Ryl. 212.
S. C. nomine Kite and Lane's Case, 6 B. & A. 101.

And where, by the same statute, Justices of one local jurisdiction have authority to convict for an offence committed within another, such authority must appear upon the face of the conviction:—Therefore, where Justices of the port of *D.* convicted for an offence committed in the port of *F.*, which had an exclusive jurisdiction, without shewing on the face of the conviction that the Justices of *D.* had jurisdiction over the offence, the conviction was quashed.
2 Dow. & Ryl. 212.
6 B. & A. 101.

8. A party may be convicted on a statute giving part of the penalty for the offence to the parish wherein it is committed, on the oath of a witness residing within the parish, provided such witness does not pay rates. *Rex* v. *Cottrell*, 2 Chit. 487.

9. In a conviction it must appear that the evidence on which the defendant was convicted, was given in his presence; and where a conviction merely stated that the defendant on such a day appeared before a magistrate on a summons, and that the latter proceeded to examine into the offence, and that it appeared to him on the oath of the witness that the offence was committed,—it was held bad. *Rex* v. *Selway*,
2 Chit. 522.

So, the evidence whereon the defendant is convicted, must appear on the face of the conviction;—but it is not necessary to state how the witnesses were sworn. 2 Chit. 522.

10. In a conviction under the 2 *Geo.* 2, c. 26, s. 4, for working a boat or skiff on the river *Thames* for hire, without being qualified so to do, it must expressly appear from the evidence in such conviction that the defendant worked such boat for hire. *Rex* v. *Taylor*,
2 Chit. 578.

11. The Court will not take notice of any formal defect in the proceedings under a penal statute, unless it appears upon the face of the conviction itself. *Rex* v. *Hundred of Cashiobury* (*Justices*),
3 Dow. & Ryl. 35.

12. Quashing a conviction on a penal statute, for mere matter of form at Sessions, is not an *acquittal* of the defendant, so as to conclude the case against any further inquiry in the Court of King's Bench. *Rex* v. *Ridgway*,
1 Dow. & Ryl. 132.
S. C. (not S. P.) 5 B. & A. 527.

And see Post. tit. Sessions.

COPYHOLD.

I. CUSTOMS RELATIVE TO.

See *Doe d. Spencer* v. *Clark*, 1 Dow. & Ryl. 44. *S. C.* 5 B. & A. 458. Ante, page 51.
Rex v. *Boughey*, 1 B. & C. 565.
S. C. nomine Rex v. *Meer* and *Forton*, 2 Dow. & Ryl. 824. Post. tit. MANDAMUS.

1. A tenant of a manor having been originally admitted to a copyhold estate, to hold the same for the lives of *H. D.* the elder, and *H. D.* the younger, afterwards surrendered the same into the hands of the lord, and took a re-grant of the same estate for the lives of *J. G.* and *D. G.* his sons, and the life of the longest liver of them *successively*, according to the custom of the manor, and paid a fine to the lord for his admittance, the grant describing him as *sole purchaser*. By the custom of the manor, when a copyhold tenement is granted by copy of Court roll to any person, to hold the same to such person for the lives of two or more other persons, and the life of the longest liver of such other persons *successively;* and the grantee dies during the life or lives of any one or more of such other person or persons, without having devised the copyhold tenement by his will; such one or more of such other person or persons so surviving the grantee shall be entitled by virtue of such grant, to take and hold the copyhold tenement *successively*, as they are respectively named in the grant during his or their life or lives respectively: but if the grantee devises the copyhold tenement by his will, the devisee upon his death shall hold the same during the life or lives of such other person or persons so surviving. The grantee devised his copyhold estate to his eldest son, one of the *cestui que vies* named in the grant, who, upon his father's death, entered into the possession of the estate: —Held, that the custom was good and valid in law; and not being inconsistent with the grant, barred the lord's right of entry. *Doe d. Nepean (Bart.)* v. *Goddard*, 2 Dow. & Ryl. 773. *S. C.* 1 B. & C. 522.

II. SURRENDER AND ADMITTANCE.

1. Where a *feme sole*, after marriage, was admitted tenant of a manor in the north of *England*, of certain premises to her and her heirs, as of her own tenant-right, according to the custom; and afterwards the lord executed a conveyance of the same premises to the husband in fee, and enfranchised the same from all seigniory rights to which they were previously liable: it seems that this conveyance, after his death, did not operate by way of grant of the estate in fee, but as an enfeoffment of the tenant-right estate; and that the wife's estate became a tenancy in fee-simple, and descended upon her heirs; and that those who derived title from them had a right to claim as heirs *ex parte maternâ*. *Doe d. Newby* v. *Jackson*, 2 Dow. & Ryl. 514. *S. C.* 1 B. & C. 448.

2. The statute 55 *Geo.* 3, c. 192, which was passed "to remove certain difficulties in the disposition of copyhold estates by will," extends only to supply surrenders in *form*, but not surrenders in substance:—Therefore, where a *feme covert* omitted to surrender to the use of her will:—Held, that the case was not within that statute. *Doe d. Nethercote* v. *Bartle*, 1 Dow. & Ryl. 81. *S. C.* 5 B. & A. 492.

3. A copyholder who has been admitted to a tenement, and done fealty to the lord of a manor, is estopped in an action by the latter for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. *Doe d. Nepean* v. *Budden*, 5 B. & A. 626. *S. C.* 1 Dow. & Ryl. 243.

COPYRIGHT.—See Post. tit. LITERARY PROPERTY.

CORONER.—See Post. tit. JURY.

CORPORATION.

I. OFFICERS AND MEMBERS.

(a) Election of, when and how made.

1. A charter of incorporation empowered the mayor and aldermen *for the time being*, or the greater part of them, to choose and name four of the burgesses or inhabitants, "out of which four so to be named and chosen, the mayor, alderme ., bailiffs, principal burgesses, and other burgesses, and inhabitants of the borough, *for the time being*, (they being also for that purpose upon the same day congregated and assembled together,) *or the greater part of them as should be so congregated and assembled*, might have power and authority, by the greater part of the voices of them so assembled together, to choose and make one to be the mayor:" Held, that the election of a mayor by a majority of the whole elective body taken collectively was invalid, it appearing that there was not a majority of each definite body of principal burgesses present at the time of the election. *Rex* v. *Bower*, 2 Dow. & Ryl. 761. *S. C.* 1 B. & C. 492.

2. So where the charter of a corporation, consisting of a mayor and twenty-four capital burgesses, granted that when and so often as it should happen that any one or more of the twenty-four capital burgesses should die, or dwell without the borough, or should from any cause be removed from his office, that then and so often, it should and might be lawful to the other capital burgesses, "at that time surviving or remaining, or the greater part of *the same*, of whom the mayor for the time being should be one, to elect another or others of the burgesses of the said borough, into the place or places of the capital burgess or burgesses so happening to die," &c.;—and a burgess having been elected to fill up a vacancy (occasioned by death) by *twelve capital burgesses only*, who were alleged to be the capital burgesses at that time *surviving and remaining*:—Held, that the election was void, it not being made by a majority of the whole definite body of capital burgesses, to which the words "or the greater part of the *same*," were referable. *Rex* v. *Wyllyams*, 3 Dow. & Ryl. 75.
Rex v. *Devonshire*, 3 Dow. & Ryl. 83. *S. C.* 1 B. & C. 609.

(b) Duties and Liabilities.

1. Payment of a fine, imposed by the bye laws of a corporation, for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled to do so by *mandamus*. *Rex* v. *Bower*, 2 Dow. & Ryl. 842. *S. C.* (not *S. P.*) 1 B & C. 492.

2. The annual Indemnity Act is prospective as well as retrospective, and extends to persons who may be in default during the time for which it is made, and is not limited to those who had incurred penalties or disabilities before it was passed; it being the intention of the legislature to extend the time for taking the oaths and performing the other acts required of persons filling certain offices. *In re Stevenson*, 2 B. & C. 34.

II. BYE LAWS.

(a) How made, and Requisites of.

1. Though a bye law of the corporation of *Cambridge* requires an indenture of apprenticeship to be inrolled, yet if it has been exhibited to the town clerk, who marked it as being inrolled, it is sufficient, notwithstanding it is not inrolled in the corporation books. *Rex* v. *Cambridge (Mayor)*, 2 Chit. 144.

2. But under another bye law, service at another place is not sufficient, unless the trade there was subservient to the trade at *Cambridge*. 2 Chit. 144.

3. The words "shall be lawful," when found in the bye law of a corporation, are not to be construed as obligatory to do what the law ordains. Therefore, where a bye law of the corporation of *Eye* ordained that upon the happening of any vacancies in the number of twenty-four common councilmen, such vacancies should be filled by the freemen inhabiting the town; and that a great Court should be holden once every quarter,

at which "it should be lawful" for the bailiffs to admit to the freedom of the town such persons of good fame as had been resident therein for one whole year:—Held, that this bye law was only optional, and could not be enforced by *mandamus* to compel the admission of qualified inhabitants to the freedom of the borough. *Rex* v. *Eye* (*Bailiffs and Corporation*),
2 Dow. & Ryl. 172.
S. C. 1 B. & C. 85.

III. ACTIONS BY AND AGAINST.

See also Post. tits. { MANDAMUS. QUO WARRANTO.

1. An action of *assumpsit* is maintainable on a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognized by statute. *Murray* v. *East India Company*,
5 B. & A. 204.

And see *Broughton* v. *Manchester Water Works*, 3 B. & A. 1.

COSTS.

N. B. When an attachment may be granted for non-payment of costs, see Ante, tit. ATTACHMENT. I.——*How costs on an award are payable*, see Ante. tit. AWARD. IV. (*d.*) See also Post. tit. DAMAGES.——*Where an attorney has a lien for his costs, and what are allowable to him on taxation*, see Ante. tit. ATTORNEY, X.

For Costs on a Certiorari, see Ante. tit. CERTIORARI. III.

I. PLAINTIFF'S RIGHT TO.

(*a*) *By Particular Statutes*.

1. The plaintiff is entitled to full costs in an action on the statute of *Edw.* 6, for treble value of tithes not set out, where there was a verdict for him, subject to a reference, and the arbitrator directed a verdict to be entered for treble value, of 1*l.* 10*s.* *Pedley* v. *Frampton*, 2 Chit. 155.

2. It seems that under the statute 8 & 9 *Will.* 3, c. 11, s. 3, which gives the plaintiff his costs, in an action for the treble value of tithes, the plaintiff is only entitled to such costs after plea pleaded, or joinder in demurrer, and not in the case of a judgment by default. *Bale* v. *Hodgetts*, 1 Bing. 182.

3. The statute 28 *Geo.* 3, c. 37, s. 24, gives a plaintiff only two-pence damages, "besides the goods seized, or the value thereof," if the Judge certifies that the officer had probable cause for the seizure:—In trespass against Custom House officers for seizing a quantity of *Verdigris* of the plaintiff's, which was afterwards returned to him in a deteriorated state before the commencement of the action, and sold at a less price than it was originally worth, in consequence of the seizure; and a verdict was found for the plaintiff, for the difference in price between the value at the time of the seizure, and when returned:—Held, that damages given for the deterioration in value were recoverable, notwithstanding the Judge's certificate under that statute, that there was probable cause for making the seizure. *Laugher* v. *Brefitt*, 1 Dow. & Ryl. 417.
S. C. 5 B. & A. 762.

(*b*) *In Personal Actions.*

1. The Court knows no distinction between *costs* generally, and *full costs*: Therefore, though the statute 11 *Geo.* 2, c. 19, s. 19, speaks of "*full costs*," it does not take away the Judge's power to certify under the 43 *Eliz.* c. 6, that the costs are less than 40*s*. *Irwin* v. *Reddish*, 1 Dow. & Ryl. 413. *S. C.* 5 B. & A. 796.

(*c*) *In Trespass.*

See also Div. VI. Post. pages 86-7.

1. In an action of trespass for entering the plaintiff's close, and digging a ditch, and cutting down a tree, with a count on an *asportavit*, to which the defendant pleaded not guilty, and *liberum tenementum*, where the material question on the trial was, whether the tree grew on the plaintiff's or defendant's ground; the Jury found a verdict for the former, with 37*s*. damages, (the value of such tree,) and the Judge certified under the 43 *Eliz.*:—Held, on a motion that the Master should be ordered to tax the plaintiff his costs; that the action was not within the statute; and that notwithstanding the Judge's certificate, the plaintiff was entitled to his full costs; for although the title to the freehold did not in fact come in question, it might on the record so framed; and the cause could not have been tried in an inferior Court. *Littlewood* v. *Wilkinson*, 9 Price 314.

2. A certificate to deprive the plaintiff of costs, may be indorsed on the *postea* after costs have been taxed, although the attorney for the defendants was present and did not object to such taxation. *Foxall* v. *Banks*, 5 B. & A. 536.

(*d*) *How restrained by Court of Conscience Acts.*

1. An action may be brought in a superior Court when the demand is above 40*s*. though it be reduced by a set-off. *Gobed* v. *Birt*, 2 Chit. 394.

2. The Court will not stay proceedings on an affidavit that the debt was under 40*s*., and that the parties resided within the jurisdiction of an inferior Court. *Culliford* v. *Dyche*, 2 Chit. 395.

3. It is too late for a defendant to apply to the Court after final judgment has been signed, in order to deprive the plaintiff of costs, under the Court of Requests' Act. *Calvert* v. *Everard*, 5 M. & S. 510.

4. *Assumpsit* for use and occupation, is a cause of action within the jurisdiction of the *Bath* Court of *Requests*; and a defendant occupying a warehouse in that city, though he does not personally reside therein, is entitled to be sued within the local jurisdiction for a debt under 10*l*. arising out of the limits thereof. *Axon* v. *Dallimore*, 3 Dow. & Ryl. 51.

5. Where the plaintiff sued in a superior Court for 34*l*. ascertained by a surveyor to be due to him for measured work and labour, done within the jurisdiction of the *Rochester* Court of *Requests*; and the defendant proved payment to the amount of 24*l*., and the Jury, estimating the work at 26*l*., found for the plaintiff only 1*l*. 2*s*. damages:—Held, that this was not a case in which the defendant was entitled to enter a suggestion to deprive the plaintiff of costs, under the statute 48 *Geo.* 3, c. 51. *Harsant* v. *Larkin*, 3 Brod. & Bing. 257.

6. An action for money had and received, brought against the receiver of an estate, to recover money received by him for rent, for the purpose of trying the title of the estate, is an action for rent, and within the meaning of the 39 & 40 *Geo.* 3, c. 104, s. 13; and the plaintiff, although he recovered a verdict for 3*l*. 10*s*. only, was held to be entitled to costs. *Drew* v. *Fletcher*, 1 B. & C. 283.

7. An award of less than 5*l*. on the reference of a cause, brings it within the *London* Court of Conscience Act. *Day* v. *Mearns*, 2 Chit. 156.

8. Where the defendant, being indebted to the plaintiffs on a bill of exchange, renewed such bill when it became due, by giving another at a longer date, and gave a warrant of attorney to confess judgment in case the second bill should not be paid when it became due, and agreed to pay the costs of such warrant of attorney; and the plaintiffs retained the first bill in their possession, and the second bill was paid when it became due, but not the costs of the warrant of attorney, which amounted to 2*l*. 12*s*. 6*d*.; whereupon the plaintiffs sued the defendants in *assumpsit*, and declared on the first bill, and added the common money counts, and a count o an account stated; and the Jury found a general verdict for the plaintiffs for the latter sum;—the Court of C. P., with a view to a suggestion to deprive them of costs, allowed the verdict to be en-

tered on the common money counts, considering that the plaintiffs had under the circumstances no right to sue on the first bill. *Dillon* v. *Rimmer*, 1 Bing. 100.

9. An attorney, plaintiff, is not compellable to sue in a Court of *Requests*, unless his privilege is taken away by the express words or necessary construction of the statute establishing such Court. Where therefore, an attorney of the Court of C. P. sued there by attachment of privilege, and recovered less than 5*l.*;-that Court refused to restrain him from taking out execution for costs, although the debt for which he sued was recoverable under the 47 *Geo.* 3, c. 37, which enacts, that if any action should be brought in any other Court, for a debt not exceeding 5*l.*, and recoverable by virtue of that act in the Court of *Requests* established thereby, the plaintiff by reason of a verdict for him should not have any costs. *Johnson* v. *Bray*, 5 Moore 622.

II. DEFENDANT'S RIGHT TO.

(*a*) *On Nonsuit, Verdict, or Judgment.*

1. A plaintiff suing as assignee of an insolvent debtor, is not, by analogy to the case of executors and administrators, within the exemption in the 23 *Hen.* 8, c. 15; but if nonsuited, must pay the defendant's costs: nor will the Court of *Exchequer* suspend the payment of them on an affidavit that the plaintiff has not received sufficient assets, to be paid *quando acciderint*. *Andrews* v. *Sealy*, 8 Price 212.

2. If in an account between the plaintiff and defendant there are items clearly due on both sides, the former ought to hold the latter to bail for the amount of the admitted balance only. Where therefore, a plaintiff arrested a defendant, and held him to bail for 20*l.* knowing that the latter had a cross demand, which would reduce the debt to 6*l.*, and upon the trial he recovered the latter sum only:—Held, that the defendant was entitled to his costs under the statute 43 *Geo.* 3, c. 46, s. 3, having been arrested and held to bail "without any probable cause." *Dronefield* v. *Archer*, 1 Dow. & Ryl. 67. *S. C.* 5 B. A. 513.

3. Where an attorney brought an action for his bill of costs, and arrested the defendant for a larger sum than was afterwards found to be due upon taxation, without having any probable cause for so doing:—Held, that this was a case within the 43 *Geo.* 3, c. 46, s. 3; and if not, still, that the Court, in the exercise of its jurisdiction over its officers, might compel an attorney to pay costs under such circumstances. *Robinson* v. *Elsam*, 5 B. & A. 661.

4. The defendant is not entitled to costs under the 43 *Geo.* 3, c. 46, where a verdict has been taken for a less sum than that for which the plaintiff held the defendant to bail,—as the right to recover the whole sum claimed was fairly triable. *Edginton* v. *Hood*, 2 Chit. 147.

5. Where the defendant was arrested and held to bail for 17*l.*, and paid 3*l.* into Court, which the plaintiff took out and stayed proceedings:—Held, that the defendant was not entitled to costs, under the 43 *Geo.* 3, c. 46, s. 3. *Porter* v. *Pittman*, 2 Dow. & Ryl. 266.

6. Where the defendant, on being arrested, paid under the statute 43 *Geo.* 3, c. 46, the debt and 10*l.* for costs (which was more than sufficient to cover them), and informed the plaintiff's attorney that he should reclaim what might remain after payment of debt and costs; and the attorney, on the under-sheriff's omitting, after request, to remit the money, proceeded in the action, and incurred further costs:—Held, that the defendant was not liable to pay such costs so incurred after the arrest. *Clarke* v. *Yeates*, 3 Brod. & Bing. 273.

7. Where the defendant was arrested for a sum claimed to be due to the plaintiff for board and lodging, charged at the rate of 2*l.* 2*s.* *per* week, and it was proved that the plaintiff had expressly agreed to charge at the rate of one guinea *per* week, and a verdict was found for a less sum than the defendant was held to bail for; and a rule *nisi* having been obtained for allowing the defendant his costs under the 43 *Geo.* 3, c. 46, s. 3, and the plaintiff in answer thereto by his affidavit denied that there was any such agreement, and swore that the whole sum claimed was justly due to him:—the Court acted upon the evidence given at the trial, and made the rule absolute. *Glenville* v. *Hutchins*, 1 B. & C. 91.

III. EXECUTORS AND ADMINISTRATORS, LIABILITY OF.

1. Where the plaintiffs sued as executors, upon a count alleging that the de-

fendant, after the death of the testator, accounted with the plaintiffs as executors, concerning certain sums due from the defendant to the plaintiffs as executors; and that the defendant upon that account, being found indebted to them as executors, promised them as such, to pay:—Held, on their being nonsuited, that as it appeared on the face of such count that the plaintiffs might have sued in their own right, they were liable to costs. *Jones* v. *Jones*, 1 Bing. 249.

2. Where the lessor of the plaintiff, having entered into the common consent rule to pay costs, died between the commission-day and the trial, and was nonsuited upon the merits:—Held, that the executor of the lessor was not liable for the costs under such rule given by the testator in his lifetime. *Doe d. Payne* v. *Grundy*, 2 Dow. & Ryl. 437. *S. C.* 1 B. & C. 284.

IV. IN ERROR.

1. Judgment for the plaintiff in error from an inferior Court, and that it might be referred to the Master to tax the plaintiff's costs, where the defendant had not joined in error, in compliance with the usual side-bar rule, can only be obtained by a rule to shew cause in the first instance. *Swift* v. *Bottom*, 1 Dow. & Ryl. 183.

V. ON PAYMENT OF MONEY INTO COURT.

See *Porter* v. *Pittman*, 2 Dow. & Ryl. 266. Ante, last page.

1. Where the plaintiff, an attorney, claimed 21*l.* from the defendant, as his moiety of the expenses for preparing a lease, and five years afterwards sued him for the recovery of that sum; and the defendant, before the delivery of the declaration, took out a summons to stay proceedings on payment of 15*l.* and the costs then incurred; which the plaintiff refused to accept, but proceeded in the action by delivering a declaration; and the defendant pleaded the general issue, and paid 15*l.* into Court, which the plaintiff afterwards took out in full satisfaction of his demand:—The Court of C. P. refused to deprive him of the costs incurred between the obtaining the rule and the taking the money out of Court, there being nothing oppressive or vexatious in the plaintiff's conduct. *Carr* v. *Smithies*, 6 Moore 430. *S. C.* 3 Brod. & Bing. 168.

And see *Draper* v. *Neill*, *Jones* v. *Johnson*, *Aspinall* v. *Smith*, 6 Moore 431-436. *n.*

VI. ON JUDGMENT, OR A VERDICT AS TO PART.

1. Where, in an action on a bond against several defendants, they sever in pleading, and there is an issue in fact, and a verdict is obtained for the plaintiff against some defendants, and the other defendant pleads infancy, and obtains judgment on a demurrer to a replication of ratification after age:—the defendants who tried the issue are not entitled to costs. *Baylis* v. *Dynely*, 2 Chit. 153.

2. Where, in case against an agent for misfeasance, the declaration, in addition to special counts on the misfeasance, contained two in trover, with an allegation of special damage; and the plaintiff failed in substantiating the counts for misfeasance, or the allegation of special damage, but recovered on the common count in trover:—Held, that he was only entitled to the costs of that count, divested of the special allegation. *Lopes* v. *De Tastet*, 3 Brod. & Bing. 292.

3. Where the plaintiff's cause of action is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict on some issues, and the defendant on others, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but not the costs of the issues found for the defendant; on which however, the latter is not entitled to claim any costs from the plaintiff: but where the defendant suffers judgment by default as to some causes of action, and pleads as to others, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, the latter is entitled to the costs of the issues found for him, and the plaintiff to those only of the judgment by default. Where, therefore, to an action of trespass, the defendant pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned, and the defendant suffered judgment by default as to the new assignment, and the plaintiff was bound to go to trial to get rid of the general issue, which would

otherwise have barred his whole action, and he could not by any other means have obtained damages on the judgment by default:—Held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, although the Jury found a verdict for the defendant on one of the special pleas, the costs of such issue being deducted, but not allowed to him on that issue. *House* v. *Thames Navigation (Treasurer)*, 6 Moore 324.
S. C. 3 Brod. & Bing. 117.

4. Where, in an action of trespass for breaking and entering the plaintiff's close, the Jury found a verdict for the defendant, on the issue taken on a common right of way pleaded, and found one shilling damages, by *consent*, on a new assignment, to which there was judgment suffered by default:—The defendant was held by the Court of *Exchequer*, to be entitled to the general costs of the trial; and the plaintiff to be not entitled, on the taxation of costs, to have allowed to him the costs of the assessment of damages, as the costs of executing an inquiry, although he had a witness attending at the trial to prove notice given to the defendant before action brought, not to trespass *extra viam*:—and the Master having allowed the plaintiff costs, on that principle, was ordered to review his taxation in that respect; the Court holding, that he was entitled to no more costs than damages. *Harber* v. *Rand*, 9 Price 336.

5. In trespass for cutting down trees, the defendant pleaded, first, not guilty; secondly, several pleas of justification, because the trees obstructed a highway; and the plaintiff in his replication joined issue on the plea of not guilty, and denied the highway, and new assigned cutting down trees *extra viam*; and the defendant joined issue on the special plea, and suffered judgment by default on the new assignment;—The Jury having found a verdict for the defendant on the issues on the special pleas, and assessed damages on the new assignment:—Held, that the plaintiff was entitled to full costs, except upon the issues on the special pleas; and that the defendant was not even entitled to costs on those issues. *Longden* v. *Bourn*, 1 B. & C. 278.

VII. NEW TRIAL.

1. Where the Court orders a new trial, the costs to abide the event, such event means the ultimate event of the cause:—Therefore, if the verdict on the second trial be set aside, and on a third, the ultimate event is the same as at the first trial, the party succeeding at the last will be entitled to the costs of the first trial. *Meule* v. *Goddard*, 5 B. & A. 766.

2. Where the plaintiff obtained a verdict subject to an award, and the arbitrator made a material mistake in his award, and the defendant refused to refer matters back to him: the Court of C. P. set aside the verdict, and discharged the rule for the reference: and the plaintiff having taken the cause down to a second trial, and again obtained a verdict:—Held, that he was entitled to the costs of both trials. *Payne* v. *Bailey*, 3 Brod. & Bing. 304.

3. Where the defendant had obtained a verdict, and the Court of C. P. granted a new trial on the ground that it was against evidence, and directed the costs of the former trial to abide the event of the second, and on that trial the plaintiff obtained a verdict:—Held, that he was only entitled to the costs of such second trial. *Brown* v. *Boyn*, 5 Moore 309.

4. Where a rule for a new trial is silent as to the costs of the first, and the cause is afterwards referred at *Nisi Prius*, and determined in favour of the plaintiff, he is not entitled to the costs of the first trial. *Summers* v. *Formby*, 1 B. & C. 100.

5. The plaintiff's attorney, in a cause tried at *Nisi Prius*, contradicted the testimony given by one of the defendant's witnesses, who had sworn that he never had any conversation with the former on the subject in question; by stating positively that he had, and what the conversation was; and the defendant's witness was in consequence committed for perjury, but was afterwards discharged, on the attorney's stating the next day that he might have been mistaken in the person of the witness for that of his brother, who greatly resembled him; and an application being made for a new trial under these circumstances, and that the plaintiff or his attorney should be ordered to pay the costs of the former trial: the Court of *Exchequer* granted a rule accordingly, which was afterwards made absolute, and the plaintiff's attorney was ordered to pay the costs of the former trial. *Trubody* v. *Brain*, 9 Price 76.

6. Where the plaintiff has been nonsuited, on the ground that a notice of set-off had given sufficient information of the sum intended to be set off against the demand, and that the defendant was not precluded by his particulars of set-off from entering into a proof of a counter-demand not stated therein; and that nonsuit was afterwards set aside; (the Court of *Exchequer* considering that he was precluded,) and a new trial granted; if, before the second trial, the defendant obtains leave to amend his particulars, so as to obviate the objection taken on the former trial, upon payment of costs, the plaintiff is not entitled to be paid the costs of the first trial, previous to and as the terms of the amendment; and that Court would not, under such circumstances, order the Master to review his taxation, on the objection that he had allowed the plaintiff only 20*s*., the costs of a common amendment. The costs of the former trial were ordered to abide the event of the cause; and the Court, on discharging a rule granted to shew cause, refused to give the successful party the costs of the application. *Andrews* v. *Bond*, 8 Price 538.

VIII. OF WITNESSES.

See *Rex* v. *Yarmouth (Mayor)*, 5 B. & A. 531. Post. page 90.

1. Where there is reasonable ground to believe that the testimony of a witness will be admissible, his expenses may be allowed on taxation of costs against the adverse party. *Rushworth* v. *Wilson*, 1 B. & C. 267.

2. Where the Master, on the taxation of costs, for not proceeding to trial pursuant to notice, disallowed the expenses of a witness brought from *Newcastle-upon-Tyne* to *London*, to give evidence by comparison of handwriting in a cause where the defence was forgery, the Court ordered the Master to review his taxation; and held, that upon a question whether the evidence were or were not admissible, the expenses of the witness ought not to have been disallowed. *Hutchinson* v. *Allcock*, 1 Dow. & Ryl. 165.

3. Costs cannot be allowed on taxation for the loss of a broker's time: nor for a witness who has not been paid before the claim is made. *Lopes* v. *De Tastet*, 3 Brod. & Bing. 292.

4. Where the Prothonotary, on the taxation of costs, allowed for various sums expended in experiments, and a compensation for loss of time to scientific and professional men employed in making them, with a view to ascertain the increased risk or advantage in a new process of boiling sugar by means of heated oil, and who were called as witnesses at the trial; the Court of C. P. directed him to review his taxation, on the ground that no such allowance or compensation ought to be made. *Severn* v. *Olive*. *Same* v. *Slade*, 6 Moore 235. *S. C.* 3 Brod. & Bing. 72.

5. The Court will not direct the Master to review his taxation, because he has allowed expenses for witnesses who were not called. *Adamson* v. *Noel*, 2 Chit. 200.

6. Nor will they allow the expenses of the plaintiff's witnesses, brought too early to the Assizes to attend on a trial there. *Anonymous*, 2 Chit. 200.

7. Where the captain of a merchant ship, domiciled in this country, was detained by the plaintiff for a considerable time to give evidence in a cause, but before issue was joined or notice of trial given:—Held, that the Master was at liberty, in taxing the costs, to allow the expenses of maintaining the witness during such detention. *Anonymous*, 2 Dow. & Ryl. 424. *S. C. nomine Berry* v. *Pratt*, 1 B. & C. 276.

8. The statute 58 *Geo.* 3, c. 70, s. 4, authorizes the Court to order the county treasurer to pay to the prosecutor or witnesses who shall appear *to have been active in the apprehension* of any person, and who shall give evidence against any person, accused of fraud or petit larceny, &c., the costs of prosecuting and appearing before the Grand Jury; and also to compensate them *for their loss of time and trouble in such apprehension.* Where a person had travelled 300 miles and incurred an expense of 17*l.* in tracing and endeavouring to bring two horse-stealers to justice, and had succeeded in apprehending them:—Held, that under that statute he was not entitled to any compensation for the money so expended. *Rex* v. *Austen*, 1 Dow. & Ryl. N. P. C. 24.

IX. SECURITY FOR—WHERE REQUIRED.

1. An application for security for costs, on the ground of the plaintiff's residing

abroad, must be made promptly after the defendant knows that fact. Where therefore, after an action had been brought in *November* 1820, and the plaintiff went abroad in *March* 1821:—Held, that the defendant applied too late in *Easter* Term, 1822, for security for costs, issue having been joined, and no affidavit being made when it came to the defendant's knowledge that the plaintiff had gone abroad:—the affidavit in support of such motion, if made after plea, must expressly state that the defendant was not acquainted with the plaintiff's residing abroad when he pleaded. *Duncan* v. *Stent*, 1 Dow. & Ryl. 348.
S. C. 5 B. & A. 702.

2. So a plaintiff residing abroad, with the knowledge of the defendant at the time of action brought, will not be required to give security for costs, after issue joined, unless some special reason is assigned to induce the Court to impose such terms on the plaintiff. *Du Belloir* v. *Waterpark (Lord)*,
1 Dow. & Ryl. 348. *n.*

3. The Court will grant a rule that the plaintiff may give security for costs, although it does not appear that application has been made to him to give such security. *Hancock* v. *Smith*, 2 Chit. 150.

But see *Bass* v. *Clive*, 3 M. & S. 283. *contrà.*

4. The Court will not grant a rule to stay the proceedings till security for costs be given, unless a previous application be made to the plaintiff's attorney for such security:—*Secus*, when it is not moved to stay the proceedings:—And *semble*, it must be sworn that the defendant has not pleaded. *Anonymous*,
2 Chit. 150.

5. But the Court granted a rule to stay proceedings till the plaintiff gave security for costs, though after plea pleaded. *Anonymous*, 2 Chit. 157.

6. A defendant cannot require security for costs after an undertaking to accept short notice of trial. *Montellano* v. *Garcias*, 1 Bing. 67.

7. Where the plaintiff carried on business abroad, and had no permanent residence in *England*, but was here at the time of bringing an action to try the validity of a commission of bankrupt, with the *permission* of the Vice-Chancellor, and it was sworn that he had no intention of leaving the country, the Court required him to give security for the costs of the action:—but it seems that such security would not have been required if the action had been brought by the *order* of the Vice-Chancellor. *Oliver* v. *Johnson*, 1 Dow. & Ryl. 560.

S. C. nomine Oliva v. *Johnson*, 5 B. & A. 908.

8. A foreign ambassador cannot be compelled to give security for costs. *De Montellano (Duke)* v. *Christin*,
5 M. & S. 503.

9. Security cannot be required from a person whilst he sojourns in this country, although he usually resides abroad. *Anonymous*, 8 Taunt. 737.

10. If the plaintiff is a native of *England*, and departs for *France*, for a mere temporary absence, the Court will not compel him to give security for costs. *Anonymous*, 2 Chit. 152.

11. If a plaintiff in error resides out of the jurisdiction of the Court, they may require him to give security for costs; and unless he does so, the defendant in error may proceed on his judgment. *Lewis* v. *Owens*, 5 B. & A. 265.

12. *Quære*—Whether the Court will grant a rule for an efficient *prochein amy* to be appointed, and security to be given for costs; at all events, the application is too late after moving to put off the trial. *Anonymous*, 2 Chit. 359.

13. But an infant who sues by his *prochein amy* need not give security for costs, even though the latter is sworn to be insolvent. *Yarworth* v. *Mitchel*,
2 Dow. & Ryl. 423.

X. OF STAYING PROCEEDINGS IN A SECOND ACTION FOR THE COSTS OF A FORMER.

1. After the acceptor of a bill of exchange had offered to pay the debt and the costs of the action against himself, the plaintiff, an attorney and indorsee of the bill, brought another action against the drawer, who was his client; the Court stayed the proceedings, upon payment of the debt and costs of one action only. *Hodson* v. *Gunn*,
2 Dow. & Ryl. 57.

2. The defendant was arrested at the suit of the plaintiff, who becoming bankrupt, the proceedings were discontinued; and the assignees having again arrested the defendant, the proceedings were set aside, the *Chancellor* having superseded the commission; but a fresh commission having issued, and another set of assignees being chosen, they arrested the defendant again and were proceeding in

their action:—Held, that these proceedings could not be stayed until the costs of the proceedings at the suit of the first set of assignees were paid. *Dawson* v. *Sampson*, 2 Chit. 146.

Semble, where proceedings have been set aside for irregularity, the plaintiff is not bound to pay the costs thereof, before he is at liberty to commence a fresh action. 2 Chit. 146.

3. Where the plaintiff having declared in *assumpsit* against trustees of a turnpike road *generally*, went to trial, and withdrew his record, and after suffering himself to be *nonprossed*, sued the same trustees a second time by *name*, for the same cause of action; the Court refused to stay the proceedings in the second action, until the costs of the first had been paid. *Pashley* v. *Poole*, 3 Dow. & Ryl. 53.

4. Where in ejectment a rule has been obtained for staying proceedings until the costs of a former ejectment have been paid, the Court will not permit the defendant, in case those costs are not paid before a given day, to *nonpros* pending the ejectment. *Doe d. Sutton* v. *Ridgway*, 5 B. & A. 523.

XI. ON MOTIONS AND RULES.

1. When a motion is opposed in the first instance, no costs of opposition can be allowed, though notice of motion was given. *Gerrard* v. *Gaskill*, 2 Chit. 401.

2. Where a party gives notice of an intended motion, and no one appears on the appointed day to make it, the Court of *Exchequer* have no rule enabling them to give the other party, who has attended the Court during the day for the purpose of opposing it, the costs of such attendance, where there has been only *one notice* given. *Warn* v. *Bickford*, 9 Price 14.

3. And that Court discharged a rule which had been obtained for shewing cause against delivering up a bail-bond, on entering a common appearance, in the case of a guarantie for the payment of goods sent to a third person, with costs, without ordering those of the motion to be paid by the defendant. *Cope* v. *Jones*, 9 Price 155.

XII. IN CRIMINAL PROSECUTIONS.

See tit. CERTIORARI III. Ante, page 75. *Rex* v. *Austen*, 1 Dow. & Ryl. N.P.C. 24. Ante, page 88.

1. Where a corporation were defendants in a cause in which the record was withdrawn, in consequence of the absence of a material witness, who was a member of the corporation, and it did not appear that his absence arose from fraud or the act of the other corporators, the prosecutor must pay the costs of not proceeding to trial pursuant to notice; as the absence of the witness, although without sufficient excuse, arose entirely from his own act. *Rex* v. *Great Yarmouth (Mayor)*, 5 B. & A. 5?1.

2. Where Justices of Peace had made a false return to a *mandamus* to appoint overseers for a township, and the Court had thereupon granted a rule *nisi* for a criminal information; and on shewing cause against that rule, contradictory facts were disclosed, which were directed to be tried by an issue; and after it had been prepared and delivered, the Justices had abandoned the issue, and obtained a Judge's order for staying proceedings, without prejudice to the question of costs; the Court ordered the Justices to pay the prosecutor the costs of preparing and delivering such issue. *Rex* v. *Lancashire (Justices)*, 1 Dow. & Ryl. 485.

3. The defendant, in a *quo warranto* information against him, to shew by what authority he held the office of registrar and clerk of the Court of *Requests* of the city of *Bristol*, is not entitled to costs under the statute 9 Anne, c. 20, s. 5. *Rex* v. *Hall*, 2 Dow. & Ryl. 341. S. C. 1 B. & C. 237.

XIII. TAXATION AND ALLOWANCE OF, IN PARTICULAR PROCEEDINGS.

See also Post. tits. { EJECTMENT. JURY.

1. The costs of a special original were allowed as between attorney and client, where the action was brought on a bond, the penalty of which was more than 50*l*., but the sum due was only found to be 20*l*. —— v. *Bonar*, 2 Chit. 148.

2. Where the Prothonotary refused to allow costs on account of gross misconduct on the part of the plaintiff's attorney, the Court of C. P. would not grant a rule for him to review his taxation, although the defendant had stayed proceedings, under a rule for staying them on payment of the *debt and costs*. *Adams* v. *Staton*, 1 Bing. 69.

3. In an action on the case against an agent for misfeasance, the Prothonotary was directed by the Court of C. P. to allow a sum paid for the postage of foreign letters, which were sworn to

have been written, as being solely applicable to the cause. *Lopes* v. *De Tastet*, 3 Brod. & Bing. 292.

4. The Court of *Exchequer* will not interfere with the province of the Master in the taxation of costs *de incremento*, by ordering a new taxation in favour of the defendant, on the ground that the plaintiff himself has been the cause of increasing the amount of costs, by unnecessarily and wantonly proceeding to trial after an offer to sign a *cognovit*, unless in a very strong and clear case:—But it seems otherwise, where there has been no previous delaying the plaintiff by the proceedings of the defendant, and the conduct of the former has been palpably vexatious; or the defendant has made the offer in good time, and a *cognovit* executed has been actually tendered; and a rule calling on the plaintiff to shew cause why the Master should not review his taxation of costs under such circumstances, having been discharged on affidavits filed in answer, stating facts which furnished a sufficient reason for what the Master had done, was discharged with costs. *Williams* v. *Wynne*, 9 Price 344.

5. Where the plaintiffs brought four actions against two insurance companies for a loss by fire, and a verdict was found for the former against each company, on two of the causes only:—Held, that costs were to be apportioned equally, although three causes only were set down for trial at the same Sittings, there being a demurrer pending in the other. *Severn* v. *Olive*. *Same* v. *Slade*, 6 Moore 235. *S. C.* 3 Brod. & Bing. 72.

6. The Jury by finding the treble value of tithes, under 8 & 9 *Will.* 3, c. 11, s. 3, in effect find the single value also; and though they omit to find costs, the Court of C. P. may, where the plaintiff is entitled to them, order such an entry to be made on the *postea* as will authorise their allowance. *Bale* v. *Hodgetts*, 1 Bing. 182.

XIV. PARTY IN EXECUTION FOR, WHERE DISCHARGED.

1. In order to discharge a plaintiff out of custody who is in execution for costs, it must appear that such costs were paid on his account:—Where therefore, a plaintiff was in execution for costs arising to a magistrate from a verdict in an action for false imprisonment, an affidavit, stating that they had been paid to the latter by the Treasury, was held insufficient. *Butt* v. *Conant*, 6 Moore 65. *S. C.* 3 Brod. & Bing. 3.

COUNTY RATE AND TREASURER.

See *Rex* v. *Austen*, 1 Dow. & Ryl. N.P.C. 24. Ante, page 88.

1. The proviso contained in the 55 *Geo.* 3, c. 51, s. 1, exempting places situate within liberties or franchises having a separate jurisdiction, from contributing to the county rate, extends only to places which have a jurisdiction separate from, and co-extensive with, the jurisdiction of the County Justices. *Rex* v. *Clarke*, 1 Dow. & Ryl. 316. *S. C.* 5 B. & A. 665.

2. An order of Sessions for assessing and levying a specific sum of money, to enable a county treasurer to repay persons who had advanced money for county purposes, on the credit of the county rates, is bad on the face of it, inasmuch as it is a rate to *reimburse*, and which the Sessions have no authority to make. *Rex* v. *Flintshire* (*Justices*), 1 Dow. & Ryl. 470. *S. C.* 5 B. & A. 761.

3. And where such treasurer, being authorised by an order of Sessions to raise money on the credit of the county rates, obtained advances from time to time from his bankers, and died in their debt:—the Sessions being satisfied that the money so advanced had been *bona fide* applied to county purposes, made an order for assessing and levying a sum of money towards the repayment of the debt; the Court held such order to have been improperly made, and quashed it. *Rex* v. *Flintshire* (*Justices*), 2 Dow. & Ryl. 843.

4. The Court refused to grant a rule calling upon the treasurer of the county of *Middlesex* to pay over money to the treasurer of the county of *Surrey*, for the expense of relieving a prisoner in the *King's Bench* and *Marshalsea* prisons, on the 53 *Geo.* 3, c. 113, s. 6, because a demand and refusal were not sworn to. *In re Mainwaring*, 2 Chit. 409.

COVENANT.

I. WHAT SHALL RUN WITH THE LAND.

1. A covenant to insure premises against fire, whic' are situate within the weekly bills of mortality, as specified in the statute 14 *Geo.* 3, c. 78, runs with the land. *Vernon* v. *Smith*, 5 B. & A. 1.

2. The assignee of a lease is not liable to the original lessor for a breach of covenant not running with the land, unless he be expressly named in the lease as a covenantor. *Grey* v. *Cuthbertson*, 2 Chit. 482.

3. Where *J. B.*, being seised in fee, conveyed to the defendant and *T.J.*, their heirs and assigns, to the use that *J. B.*, his heirs and assigns, might take to his use a rent certain, to be issuing out of the premises, and subject to such rent, to the use of the defendant, his heirs and assigns; and the defendant covenanted with *J. B.*, his heirs and assigns, to pay to him his heirs and assigns, the said rent;—and as a further security, to build within one year, one or more messuages on the premises; and *J. B.* within one year demised the said rent to the plaintiffs for 1000 years:—Held, that an action of covenant would not lie by the plaintiffs for non-payment of the rent, or for not building the messuages, for that the covenant was in gross, and only personal to *J. B.* *Milnes* v. *Branch*, 5 M & S. 411.

4. A testator, being seised in fee of certain lands, and also of a corn-mill, demised the former to a tenant for three lives, covenanting for a money rent, and in addition thereto, that the lessee should perform certain suits and services; and amongst others, that *he, his heirs and assigns*, should do suit to the lessor's mill by grinding therein all such corn as grew upon the demised land:—the testator afterwards devised the mill, and also the reversion of the land to *the same person*, who became seised upon the death of the devisor:—During the demise of the land, the lessee died intestate, and his wife took out administration of his estate and effects:—An action of covenant being brought, assigning for a breach, a neglect to grind corn at the mill during the life-time of the lessee, and also since his death:—Held, t'at the reservation of the suit to the mill was in the nature of a rent, and that the covenant to render it ran with the land, whilst the ownership of the land and the mill remained in the *same person*, and entitled the latter to maintain an action at common law upon it against the personal representative of the lessee. *Vyvyan* v. *Arthur*, 2 Dow. & Ryl. 670. *S. C.* 1 B. & C. 410.

5. Where a declaration in covenant by the reversioner against *A.*, the assignee of a lease for years, (granting licence to *B.* to continue a cert^in channel open through the bank of a navigable river, upon certain conditions,) imported that the grantors had absolute possession of the channel, and full power to grant the use of it to *B.*; and it appeared by the indenture that they were described merely as the persons "who had the greatest proportion or share in the profits of the said river; and that they, by virtue of all or any powers and authorities vesting in or enabling them, granted the licence to *B.*, his executors, administrators, and assigns:"—Held, that the grantors had no authority to grant such an hereditament, within the meaning of the statute 32 *Hen.* 8, c. 34, as would bind the assignee of the grantee. *Portmore (Earl)* v. *Bunn*, 3 Dow. & Ryl. 145. *S. C.* 1 B. & C. 694.

II. CONSTRUCTION OF.

See Ante. tit. - - CHARTERPARTY.

See also Post. tits. { INSOLVENT DEBTORS. INSURANCE.

Charlton v. *Driver*, 5 Moore 59. Post. page 94.

1. A covenant by a party, that so long as the defendant should continue and be in the actual receipt of the profits of a rectory, he would pay a yearly sum during the life of the rector, by two half-yearly payments, must be construed as a covenant for the payment of such yearly sum whilst the covenantor is in

receipt of the profits during the life of the rector, and not whilst he is merely in receipt of the profits. *Combe* v. *Jones*, 2 Chit. 700.

III. IN LEASES.

1. It seems that under the word "demise," the lessee may maintain an action of covenant against the lessor for not having sufficient power to demise for the whole term; whereby the plaintiff was put to the expense of procuring a better title for the whole term. *Fraser* v. *Skey*, 2 Chit. 646.

2. A covenant by the lessee, that he would sufficiently muck and manure the land demised with two sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three years of the expiration of the term,—is satisfied by the tenant's laying on two sets of muck within the three last years of the term, if he should think proper so to do. *Pownall* v. *Moores*, 5 B. & A. 416.

3. In a lease for years of a messuage and premises in a public street, the lessor covenanted that the lessee, his executors, &c., should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business *that might be, or grow, or lead to be offensive*, or *any annoyance or disturbance* to," any of the other tenants of the lessor, &c. The lessee granted an underlease of the premises (subject to the like covenant) to *A.*, who opened them as a public-house, in the business of a *licensed victualler*, which was not one of the businesses enumerated in the covenant:—Held, that such an act did not amount to a breach of covenant. *Jones* v. *Thorne*, 3 Dow. & Ryl. 152. S. C. 1 B. & C. 715.

IV. OF THE DIFFERENT KINDS OF.

(a) *For Rent and Repairs.*

1. Where there is a proviso in a lease, that upon non-payment of rent by the lessee, the term should cease; the lessor, and not the lessee, has the option of determining the lease, upon the breach of such proviso. *Reid* v. *Parsons*, 2 Chit. 247.

2. The assignee of a lease, whereby the lessee covenanted for himself and his assigns absolutely to repair premises without qualification, is bound to repair notwithstanding they are destroyed by fire. *Bullock* v. *Dommitt*, 2 Chit. 608.

3. To an action of covenant by tenants in common for not repairing a messuage;—Plea, that the lessee, after the demise to him, and before the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with the plaintiffs:—Held ill on general demurrer; and that the action was properly brought. *Gates* v. *Cole*, 5 Moore 554.

(b) *Quiet Enjoyment and Title.*

See also Div. V. next page.

1. The governors of the *Foundling Hospital* granted a lease for years of a certain dwelling to *L.*; and covenanted that the demised premises, or any part thereof, should not be converted into a shop or other place for carrying on any trade or public shew of business during the term, without the consent in writing, of the lessors. *L.* assigned the premises to *M.*, who, by an underlease, demised the premises to *S.*, with a covenant for quiet enjoyment, "to hold the same, without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever, by or for her, her heirs, executors, administrators, or assigns, or any person or persons whomsoever, claiming or to claim by, from, under, or in trust for her, them, or any of them, or by or through her or their acts, *means*, right, title, forfeiture, privity, or *procurement*." In this lease the covenant against converting the premises into a shop, &c. was omitted. *F.* assigned the lease to *S.*, who underlet to *W.*, and he converted part of the premises into a shop, without the consent of the original lessors, who brought an ejectment and evicted him for a forfeiture. *M.* having died, *S.* declared against her executor for a breach of the covenant of quiet enjoyment, averring that by her *act*, and through her *means* and *procurement*, in making the underlease to *F.* without any covenant similar to that in the original lease to *L.*, he was hindered from quietly enjoying, &c:—Held, on demurrer, that the action would not lie. *Spencer* v. *Marriott*, 2 Dow. & Ryl. 665. S. C. 1 B. & C. 457.

2. In an action for a breach of covenant on the defendant's demise, for not having a good title to demise for the whole of the term demised, whereby the plaintiff's assignee of the lease was evicted, and the plaintiff put to costs in an action against him by such assignee, for such eviction; the plaintiff must shew who evicted the assignee: and merely stating that a third person was seised in fee of the premises, and that the assignee was evicted generally, is not sufficient. *Fraser* v. *Skey*, 2 Chit. 646.

(*c*) *Renewal.*

1. The plaintiffs being possessed of lands, which they held under the Archbishop of *Canterbury* by lease, renewable on payment of certain fines and fees, underlet such lands to the defendant for a term, who covenanted "that he would from time to time, and at every time during the said term, pay to the plaintiffs, or the Archbishop, such part of the fine and fees, which, upon every renewal by the plaintiffs, of the lease by which they held the premises demised, (among others,) should be paid or payable by the plaintiffs in respect of the premises thereby demised to the defendant:— Held, that the reasonable construction of this covenant was, that the defendant only intended to pay fines commensurate with the interest in the premises. *Charlton* v. *Driver*, 5 Moore 59.

V. PLEADINGS IN.

See Ante. tit. - APPRENTICE.
Post. tits. INSURANCE. SET-OFF. VARIANCE.

1. The defendant by indentures, assigned a bond to the plaintiff, executed to the former by *J. R.*; and covenanted that he would maintain, ratify and confirm all actions brought on the bond by the plaintiff, without releasing the same. A declaration on this covenant averred, that the plaintiff had brought an action on the bond against *J. R.*; but in breach of covenant the defendant did not maintain, ratify, and confirm the said action, "although he was afterwards, to wit, on the day and year aforesaid, *requested*—;" but, on the contrary thereof, by deed did release *J. R.* from all actions, &c., whereby the plaintiff was hindered in his action, and sustained the costs thereof: and also of the rule of Court to set aside the release. On demurrer to this breach:—Held, first, that it was not necessary to allege a *venue* to the *request* stated in the declaration, the request itself being unnecessary; and secondly, that the allegation of special damage, if objectionable, ought to have been demurred to specially, and could not be taken advantage of upon general demurrer to the breach assigned. *Amory* v. *Brodrick*, 1 Dow. & Ryl. 361. *S. C.* 5 B. & A. 712. 2 Chit. 329.

2. A covenant by the defendant, to permit and suffer the covenantee peaceably and quietly to enjoy, &c. an annuity secured on premises demised by the defendant for a term of years to trustees, for the purpose of such security, and for raising thereout by mortgage or sale, a sum of money to be paid to the annuitant; and that the covenantor would not hinder, molest, or disturb him in the peaceable enjoyment, &c., *and would do all such further and other lawful and reasonable acts and things, devices*, conveyances, and assurances in the law, *for the further and better granting and securing, &c.*, as should be required:—and the breaches assigned were, that (an arrear of annuity having accrued) the defendant did not suffer the plaintiff (the covenantee) peaceably to enjoy, &c.; but, on the contrary, hindered, molested, and disturbed him in this, to wit, that although *requested to do a reasonable act* for the further securing, &c.; that is to say, that the defendant (the covenantor) *should direct* the trustees to raise, levy, and pay to the plaintiff the said arrears, and sum of money, &c., yet he would not, &c.; and that although requested *to direct the trustees to take up money on mortgage* of the said premises, for the purpose of paying, &c., and *to join therein* and deliver up the deeds, would not, &c.:—Held, to be ill assigned, the refusal to direct not being an act of molestation: for the covenant not being personal in that respect, and it not being shewn that the act required to be done by the defendant was such a necessary act as that the annuity could not be enjoyed without its being done on his part, and that he was consequently under an obligation to give such direction, it was not broken by such refusal:—Therefore a judgment by default was arrested on that ground. Such an objection is not cured by a judgment by

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default, if it be cured after verdict; and a rule to shew cause why the judgment should not be arrested, or the inquiry set aside, was granted in the alternative. *Warn* v. *Bickford*, 9 Price 43.

3. In a declaration of covenant to "save harmless and keep indemnified *W.*, his heirs, &c., and also certain closes, &c., from and against all *actions, suits, claims*, and demands whatsoever, *both in law and equity*, which should or might be had, made, commenced, or prosecuted by any person or persons claiming any right, title, or demand, in, to, or upon the said closes, &c., as heir-at-law of *H. P.* and others, of and from all costs, charges, and expenses which the said *W.*, &c. should sustain or be put to, for or by reason or means of such actions, suits, claims, and demands, or otherwise howsoever:" to which the breaches assigned were, first, that on, &c. *H. W. P.* "made claim and demand, and claimed to have right and title of, into, and upon the said closes, &c.; and entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use;" and secondly, that he "caused and procured, and suffered and permitted, one *H. B.*, who then held and enjoyed the said closes, to attorn to him, and to withhold the payment of the rents, issues, and profits;" and thirdly, that "certain title deeds relating to the said closes, &c. were kept, detained, and withholden by one *A. W.*, at the instance and through the means, and by and through the claim and demand of *T. B.*, *W. P.* &c.:"—Held, after the defendant had pleaded over, that these breaches were well assigned on the covenant declared upon. *Fowle* v. *Welch*, 2 Dow. & Ryl. 133. *S. C.* 1 B. & C. 29.

And see *Nash* v. *Palmer*, 5 M. & S. 374.

4. A declaration in covenant at the suit of the executor of a termor, for a breach of covenant after the death of the termor, should state the interest and title of the latter in the premises. Where therefore, a declaration stated that *A. B.* demised premises to the testator of the plaintiff (*viz.* the termor, without stating that *A. B.* was seised in fee, or of any other estate), and that the plaintiff's testator demised them to *C. D.*, and stated a breach of covenant after the death of the plaintiff's testator, it was held bad. *Mackay* v. *Mackreth*, 2 Chit. 461.

5. An executor of a lessor, who was tenant from year to year, may declare for a breach of covenant in a lease for twenty-one years granted by the lessor, though the breach was committed after such lessor's death. 2 Chit. 461.

6. The first count of a declaration in covenant by deed to abide by an award, alleged breaches generally, that the defendant did not on request pay the money awarded, and delayed the arbitrators from making their award so soon as they would have done. Plea to this count, a revocation by deed of the authority of the arbitrators before they made their award:—Held, on demurrer, that this plea was not a confession of the covenant; upon which the plaintiff was entitled to judgment. *Marsh* v. *Bulteel*, 1 Dow. & Ryl. 106. *S. C.* 5 B. & A. 507.

7. To an action of covenant by tenants in common for not repairing a messuage;—Plea, that the lessee, after the demise to him, and before the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with the plaintiffs:—Held ill on general demurrer; and that the action was properly brought. *Gates* v. *Cole*, 5 Moore 554.

8. Where *A.* covenanted with *B.*, on the dissolution of partnership, to leave between them a certain sum in a banker's hands till *March* 1822, as a security towards payment of any demands which might be made on *A.* in respect of debts contracted by *B.*, on account of the credit of the partnership; and that the sum, after *March* 1822, should be paid to *B.*, subject to such claims as might have been made; and *B.* assigned for breach, that though he had contracted no such debts, and though no claim had been made, *A.* prevented the banker from paying the said sum over to *B.* after *March* 1822; and *A.* pleaded that a claim or demand was made on him in respect of a debt by one *T. H.*, *as being* a debt contracted by *B.* on account of the credit of the partnership:—Held, that such plea was bad on demurrer. *Want* v. *Reece*, 1 Bing. 18.

9. In covenant for not setting out tithes of certain garden ground, the defendant pleaded an Inclosure Act, by which the plaintiff received an allotment of waste lands in the parish, in lieu of tithe, but omitted to allege that

the Commissioners under the Inclosure Act had made their award in pursuance thereof; and after a finding for the defendant by the Jury upon an issue of fact, the Court entered judgment for the plaintiff, *non obstante veredicto*. *Ellis* v. *Arnison*, 3 Dow. & Ryl. 27. *S. C.* (not *S. P.*) 5 B. & A. 47.

CURATE.—See Ante. tit. CLERGY.

CUSTOMS.

See tit. COPYHOLD. I. Ante, page 81.
Rex v. *Lane*, 1 Dow. & Ryl. 76, Ante, page 79.

1. *Quære*—Whether a custom to demise by parol an incorporeal hereditament, (for instance, a right of common,) can be supported at law? *Lathbury* v. *Arnold*, 1 Bing. 219. And see *S. C.* Post. tit. REPLEVIN.

DAMAGES.

HOW ASSESSED.

See BOND. VIII Ante, page 72.
For the Assessment of Damages on reference to the Master or Prothonotary, See Post. tit. INQUIRY, WRIT OF.

1. Where, in an action for a libel, the defendant pleaded the general issue, and several special pleas stating that it contained a true account of proceedings in a Court of Law, and the Jury found for the defendant on six out of eight pleas comprehended in the last of two issues, and for the plaintiff on the residue of such pleas, and on the first issue without assessing any damages; and the plaintiff having pursuant to the decision of the Court of K. B., entered up, as to the pleas found for the defendant, judgment *non obstante veredicto*, with an award of a writ of an inquiry to assess the damages;—the Court of *Exchequer Chamber*, in error, reversed the judgment of the Court of K. B. as to the award of the writ of inquiry; and the final judgment thereon, remitted the record to that Court, and directed them to award a *venire de novo* to try the first issue, and the last, as far as related to the pleas on which the finding was for the plaintiff; on the ground that the verdict found for him on the first issue, and on the last, (as far as regarded the pleas on which the finding was for him,) was void, because no damages had been assessed by the Jury. *Clement* v. *Lewis* (*in error*), 3 Brod. & Bing. 297.

2. On a writ of false judgment from an inferior Court, where a Jury had assessed the damages at 1*l.* 8*s.* 6*d.* besides costs, and the costs at 12*d.*, and judgment was entered up, "that the plaintiff do recover against the defendant his damages, costs and charges, in form aforesaid, assessed by the said Jury at 1*l.* 8*s.* 6*d.*; and also 7*l.* 9*s.* 10*d.* for his costs and charges, adjudged of increase to the plaintiff, and with his assent; which said damages, in the whole, amount to 8*l.* 18*s.* 4*d.*; and the said defendant, in mercy, &c.:" Held to be sufficient without the words "at 1*l.* 8*s.* 6*d.*;" which, being a mere miscalculation, would not avoid the judgment which was before complete. *Dunn* v. *Crump*, 3 Brod. & Bing. 309.

DEBT.

I. BY AND AGAINST WHOM, AND WHEN MAINTAINABLE.

And see Post. tit. INFANT.

1. Debt lies by the drawer against the acceptor of a bill of exchange, ex-

pressed to be payable to the drawer or his order, for value received in goods. *Priddy* v. *Henbrey*,
3 Dow. & Ryl. 165.
S. C. 1 B. & C. 674.

2. But it does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that the grantor had a freehold in the premises, out of which the annuity was payable; as it must be inferred that he had such an interest, where nothing appears to the contrary. *Kelly* v. *Clubbe*,
6 Moore 335.
S. C. 3 Brod. & Bing. 130.

3. Interest of money is recoverable in an action of debt. *Verney* v. *Iddings*,
2 Chit. 234.

II. PLEADINGS IN.

1. It seems that the demand of principal and interest is divisible in a declaration of debt. *Verney* v. *Iddings*,
2 Chit. 234.

2. And that a plea in debt, that the defendant does not owe the said 10*l.* above demanded (the sum demanded being 1800*l.*) is sufficient; as the amount may be rejected as surplusage. *Attwood* v. *Bonacich*, 1 Dow. & Ryl. 473.

DEED.

I. HOW EXECUTED.

1. Where a deed purported to bear date on the 20th *November*, and was executed by one of two defendants on the 16th of that month, and by the other on a previous day:—Held to be immaterial, it not appearing that a blank was left for the date at the time of the execution. *Cockell* v. *Gray*,
6 Moore 482.
S. C. (not *S. P.*) 3 Brod. & Bing. 186.

II. CONSTRUCTION AND OPERATION OF.

For the production of Deeds, see Post. tit. INSPECTION OF. See also Post. tit. RELEASE.

1. In the construction of a deed, regard must be had to all its parts, and general words are to be restrained by a particular recital contained therein; and if a deed operate two ways, the one consistent with the intent of the party, and the other repugnant to it, the Courts will put such a construction on it as to give effect to such intent, which is to be derived from the whole of the instrument. *Solly* v. *Forbes*,
4 Moore 448.

2. A deed *inter partes* is only available between those who are parties to it: *Barford* v. *Stuckey*, 5 Moore 23.

3. Where two persons by deed agreed with *N. P.*, his executors and administrators, to pay him an annuity for twenty-one years, if they or the survivor of them should so long live; and in case *N. P.* should die within the term, to his child or children, if any, in such proportions as he should appoint; or in default of appointment, to all of them equally; and if there should be no child, to his wife, if she should remain a widow; and *N. P.* having died within the term, as well as his only child and widow:—Held, that his administrator could not claim payment of the annuity after their respective deaths. *Barford* v. *Stuckey*, 1 Bing. 225.

III. FRAUDULENT OR VOID.

And see Post. tit. FRAUDULENT CONVEYANCE.

1. Where there were two assignments of the same lease of certain premises in *Middlesex*, and the last executed was registered first:—Held, that at law the deed last registered must be considered as fraudulent and void, under the statute 7 *Anne*, c. 20, s. 1, although the party claiming under the second assignment knew, when it was executed, of the prior execution of the first assignment. *Doe d. Robinson* v. *Allsop*, 5 B. & A. 142.

2. A deed of conveyance, which omits to set out truly the whole consi-

deration directly or indirectly paid, or agreed to be paid, for an estate conveyed, is not void by the statute 48 Geo. 3, c. 149, s. 22. *Doe d. Higginbotham* v. *Hobson*, 3 Dow. & Ryl. 186.

DEMURRAGE.

1. By a charter-party under seal, the freighter was at liberty "to keep the ship on demurrage, at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require." The ship having been compelled to put into an intermediate port of her ports of loading and discharge, and the freighter having detained the vessel ten days there, and also fourteen days more than ten days at the port of delivery:—Held, in an action on the charter-party, that the master could not recover on this covenant for more than the ten days demurrage, at 5*l.* *per day*, at the port of *London*, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading and discharge; and a breach, averring that the defendant did not pay 5*l.* *per* day for demurrage for the extra delay beyond the ten days at the port of delivery, and for the delay at *Bristol*, as well as for the demurrage for ten days' delay at the port of delivery, was held bad. *Stevenson* v. *York*, 2 Chit. 570.

DESCENT.

1. Where *W. B.*, on the marriage of his daughter *M. B.*, conveyed property to the use of himself for life; remainder to the use of *E. W. O.*, *M. B.*'s intended husband, for life; remainder to the use of *M. B.* for life; remainder to the use of the issue of the marriage, in strict settlement; remainder to the use of *W. B.* for ever: and *W. B.* afterwards devised all his property, not before settled on his daughter's marriage, to the use of his widow for life; remainder to the use of *E. W. O.* for life; remainder to the use of his daughter, then *M. O.* wife of *E. W. O.*, for life; remainder to the use of their sons successively in tail, (subject to a term for the provision of younger children); remainder to the use of the daughters, as tenants in common in tail; remainder to the use of *M. O.* and her heirs: and *E.W.O.*, and *M.O.* his wife, afterwards levied a fine of all the before-mentioned premises to the use (subject to the uses in the settlement and will mentioned) of such persons as *M. O.* by will in writing, or any writing of appointment purporting such will to be signed by her in the presence of, and attested by three witnesses, should appoint; (which will, or writing of appointment, in nature of a will, *M. O.*, notwithstanding her coverture, was thereby empowered to make); and in the mean time, and for want of such appointment, for the whole or any part, to the use of *M. O.* and her heirs; and *M. O.* having survived *E. W. O.*, by whom she had no issue, married *T. L.*, whom she also survived, and then died, leaving an only son by *T. L.*: to which son, by an instrument purporting to be her will, signed in the presence of, and attested by three witnesses, she left all her real estate in fee; the instrument containing a provision that the property should go over to *M. L.*'s sister, in case of her son's dying in her lifetime; and the son shortly afterwards died a minor, intestate and without issue:—Held, that he took by descent from his mother, and not by purchase. *Langley* v. *Sneyd*, 3 Brod. & Bing. 243.

2. Where a *feme sole*, after marriage, was admitted tenant of a manor in the county of *Cumberland*, of certain premises to her and her heirs, as of her own tenant-right, according to the custom; and afterwards the lord executed a conveyance of the same premises to the husband in fee, and enfranchised the same from all seignory rights to which they were previously liable: it

seems that this conveyance, after the death of the husband, had the effect of giving the wife an absolute estate in fee-simple in the premises, descendible only upon the heirs *ex parte maternâ.* *Doe d. Newby* v. *Jackson*,

2 Dow. & Ryl. 514.
S. C. 1 B. & C. 448.

DEVISE.

I. WHAT INSTRUMENT SHALL AMOUNT TO.

1. Where *A.*, on the marriage of his daughter *C.*, conveyed property to the use of himself for life; remainder to the use of *B.*, *C.*'s intended husband, for life; remainder to the use of *C.* for life; remainder to the use of the issue of the marriage in strict settlement; remainder to the use of *A.* for ever: and *A.* afterwards devised all his property, not before settled on his daughter's marriage, to the use of his widow for life; with like remainders to the use of *B.* and *C.* and their issue, (subject to a term for the provision of younger children); remainder to the use of *C.* and her heirs: and *B.* and *C.* afterwards levied a fine of all the before-mentioned premises to the use (subject to the uses in the settlement and will mentioned) of such persons as *C.*, by will in writing, or any writing of appointment purporting such will to be signed by her in the presence of, and attested by three or more witnesses, should appoint; (which will or writing of appointment in nature of a will, *C.*, notwithstanding her coverture, was thereby empowered to make); and in the mean time, and for want of such appointment, for the whole or any part, to the use of *C.* and her heirs. *C.* having survived *B.*, by whom she had no issue, married *D.*, whom she also survived, and then died, leaving *E.*, an only son by *D.*: to which son, *C.*, by an instrument purporting to be her will, signed in the presence of, and attested by three witnesses, left all her real estate in fee; the instrument containing a provision, that the property should go over to *C.*'s sister, in case of *E.*'s dying in *C.*'s lifetime. *E.* shortly afterwards died an infant, intestate and without issue:—Held, that the instrument executed by *C.* did not, as to the estates comprised in the fine, operate as an execution of her power of appointment, but as a devise by force of her interest. *Langley* v. *Sneyd*,

3 Brod. & Bing. 243.

II. WHO ARE CAPABLE TO TAKE AS DEVISEES, AND WHAT ESTATE OR INTEREST VESTS IN THEM, AND HEREIN OF DEVISEES IN TRUST.

See *Doe d. Penwarden* v. *Gilbert*, 6 Moore 268. *S. C.* 3 Brod. & Bing. 85. Post. page 105.

1. Under a devise of a copyhold estate to the testator's wife during her life, provided she continued single; but in case she married, then to *A. B.*, when he should attain the age of twenty-three years:—Held, that though the widow married before *A. B.* attained that age, she was entitled to the estate until that event; and that the heirs-at-law were not entitled to it. *Doe d. Westminster (Dean and Chapter of)* v. *Freeman*,

2 Chit. 498.

2. Under a devise to the testator's wife of premises for life, provided she chose to reside therein, and then to *A. B.* in fee;—it is not necessray to complete *A. B.*'s right to the premises on the death

of the wife, that she should have actually resided in them;—The intention to reside, and which intention would have been carried into effect had circumstances permitted, is sufficient. *Roe d. Sampson* v. *Down*, 2 Chit. 529.

3. A will, directing the testator's debts to be paid, and devising several estates to his wife for life; and after her decease, devising his property in the following words, viz. "*I give Mr. W. the income of my four shares in the corn-market for his life, and all the rest of my estates*, with all monies in the stocks in Mr. *M.*'s hands, or any other securities, to be divided in equal shares to *E. S.* and others;" passes a reversionary interest in the said four shares in the corn-market to *E. S.* and others. *Fletcher* v. *Smiton*, 2 Chit. 558.
S. C. 2 T. R. 656.

4. Devise of freehold and leasehold estates to *A.* for ninety-nine years, if he should so long live; remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on progressively in tail male to such first son lawfully issuing for ever; and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of *A.* at the time of his death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to *B.* for ninety-nine years, if he should so long live:—Held, that *A.* took an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue; and that, upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the terms in the leasehold. *Beard* v. *Westcott*, 5 B. & A. 801.

5. Where a testator bequeathed the rents of *a dwelling-house*, situate in *A.*, to *C. B.* for his life; and after his decease he bequeathed the same rents, *together with* the rents of all his other messuages and lands, situate at *A.* aforesaid, to his three nephews and niece, for their lives and the life of the survivor, share and share alike; and, after the decease of the survivor of them, he devised all his messuages and lands to trustees in trust to sell the same, and pay over the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor of them; and then devised all the residue of his estate to *C. B.*, to hold to him, his heirs and assigns, for ever:—Held, that on the death of the testator, the nephews and niece took an immediate estate for their lives and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to *C. B.* for his life. *Doe d. Annandale* v. *Brazier*, 5 B. & A. 64.

6. A testator devised his freehold estates to trustees in trust, to secure an annuity of 60*l.* *per annum* to his wife for life; and then in trust for his two younger sons, and his two daughters, and all children to be begotten on the body of his wife, until they should severally attain the age of twenty-one years; and then unto and among them, share and share alike, as tenants in common, and not as joint tenants. The will then granted a power to the trustees to receive the rents, and to lay out the surplus beyond the wife's annuity, and other charges thereon in good securities, to grant leases of the estates for a term not exceeding seven years, "and if they should think it advisable to sell any part thereof *at any time after the testator's death*:"—Held, that this latter clause did not control the express gift of the estates to the children in fee, when they should severally attain the age of twenty-one years. *Doe d. Budden* v. *Harris*, 2 Dow. & Ryl. 36.

7. A testator devised his freehold and copyhold lands to trustees in trust, for his only infant son; and directed "the same to be *transferred* to him as soon as he should attain to twenty-one years; but in case he should die before he attained to the age of twenty-one years, then he gave to his cousin *W. P.*, his heirs and assigns, all his freehold and copyhold lands," &c.:—Held, that the trustees did not take a fee by this devise, but only an estate for years in the copyhold lands, determinable on the son's attaining twenty-one years, or by his death before that period. *Doe d. Player* v. *Nicholls*, 2 Dow. & Ryl. 480.
S. C. 1 B. & C. 336.

8. Devise to three trustees, of all the testator's freehold, leasehold, copyhold and personal estate, in trust, after payment of legacies and annuities, which annuities he directed to be paid out of bank-stock standing in his name, to pay all the rents, issues, profits, and produce of the residue of his estate and effects, as well real as personal, to his three nieces, *E. M.* and *C.*, share and share alike, for their lives; and after their decease, or either of them, that their lawful issue should have his or her mother's share of such rents, &c. for life; and if either of the nieces should die in the lifetime of the others or other of them having no issue, the share of her or them so dying, to be equally divided between the survivors of his nieces for their respective lives, and afterwards by the issue of the survivors of such nieces; and in like manner, if all his nieces, and their issue, save one, should die without issue, then such one to have the whole for her life; and after her decease, the issue of such niece, if more than one, to enjoy the whole, share and share alike; and if but one, such one to enjoy the whole alone; to hold such parts as were freehold, to them and each of them, their heirs and assigns, as tenants in common, and not as joint tenants; and if but one, to such only one, his or her heirs and assigns for ever; and in case of all the nieces dying without issue, the whole to go to the devisor's next male heir of his name, to hold to him, his heirs, and executors, in like manner. The niece *M.* married *G. B.*, who died, leaving his wife and one son surviving: *C.* also married, but had no issue. Two of the trustees died, and a considerable surplus of the testator's personal estate remained after paying debts, legacies, and annuities:—Held, first, that the surviving trustee had the legal estate in fee simple, devised to the three trustees. Secondly, that the nieces took no legal estate in the freehold tenements. Thirdly, that the son of *G. B.* took no legal estate therein, nor would he at the death of the survivor of the three nieces. Fourthly, that if the devise had commenced with the words "all the rents, issues, and profits," and the passage before these words had been omitted, the three nieces would respectively have taken estates for life in the freehold tenements under the will; with cross-remainders between them for life, in the event of one or two of them dying without issue. And lastly, that *G. B.* would, in the events as they then stood, have an estate tail in remainder, in his mother's one undivided third part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters; and that he would have an estate tail in the whole of the freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born. *Murthwaite* v. *Jenkinson*, 6 Moore 13.

9. A testator devised his lands charged with two annuities, and subject to certain legacies, to trustees, their *heirs and assigns*, until his nephew *J.*, son of his sister *M.*, should attain twenty-one; and if he should die in the mean time, until *H.*, second son of *M.*, should arrive at that age; and if *H.* should die in the mean time, until the daughter of *M.* should arrive at that age, upon trust to raise out of the rents of the premises, or by sale or mortgage thereof, portions for *H.* and the younger children of *M.*, payable on their attaining twenty-one; and further, to apply a proper sum out of the rents for the maintenance and education of *J.*, until he should attain twenty-one, and then to pay him the residue; and if he should die before twenty-one, then to apply a like sum for the maintenance of *H.*, till he should attain that age, and then to pay him the residue; and in the mean time to place out the money arising from the rent at interest, for the benefit of *J.*; and when *J.* should attain twenty-one, or in case of his death, when and as soon as *H.* should arrive at that age, or in case of his death, when the daughter of *M.* should attain twenty-one, to the use of *J.* and his assigns for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; and after the death of *J.*, to the use of his first and other sons and daughters in strict tail; and for default of such issue, to the use of *H.*, with similar limitations over to his niece, the daughter of *M.*, and an ultimate remainder to *M.* in fee. The testator died, leaving his sister *M.*, her sons *J.* and *H.*, and three younger children, alive. *J.* married, and died intestate under twenty-one, leaving a daughter:—Held, that the trustees took only a chattel interest

in the estates devised to them. *Warter* v. *Hutchinson*, 3 Dow. & Ryl. 58.
1 B. & C. 721.

S. C. (*C. P.*) 5 Moore 143. Post. page 108.

III. WHAT ESTATES PASS TO DEVISEES BY RULES OF LAW, OR APPARENT INTENT OF DEVISOR.

See Post. tit. POWER.
Smith v. *Leigh*, 6 Moore 214.
Jesson v. *Doe d. Wright*, 2 Bligh 1. reversing *Doe d. Wright* v. *Jesson*, 5 M. & S. 95.

1. *A.* being seised in fee of certain specific lands in the parish of *S.*, settled the same "to the use of himself for life, remainder to his wife for life, remainder to their issue;" and some years afterwards made his will, devising to his wife for life "all his freehold and copyhold lands, &c. whatsoever, of which he was then in the immediate possession, lying in the several parishes of *S.* and *F.*, in the county of *C.*, and also all his reversionary estate and interest expectant on the death of *M. N.* his mother, of and in certain other freehold and copyhold messuages, lands, &c., situate in the same parishes;" and after the decease of his wife, he gave the same estates to his only daughter in fee, concluding with the following residuary clause, "and all and singular other my real and personal estate, subject to the payment of my funeral expenses, and just debts, I give, devise, and bequeath unto my said wife *M. N.*, her heirs, executors, and administrators:"—Held, that the settled lands above-mentioned, of which the testator was in possession at the time of his death, passed under this devise to the heir-at-law *ex parte maternâ*; and that the will was not controlled by the residuary clause. *Doe d. Nethercote* v. *Bartle*, 1 Dow. & Ryl. 81.
S. C. 5 B. & A. 492.

2. *A.* devised all his messuage or dwelling-house in *High-Street*, in the town of *H.*, in the county of *Flint*, wherein his mother dwelt, and all and every his buildings and hereditaments in the same street, to his mother for life, and after her decease to *J. S.* *A.* had only one house in the *High-Street*, but he had two cottages behind it fronting a lane not a thoroughfare, the only entrance to which was from the *High-Street:*—Held, that these two cottages passed under the will. *Doe d. Humphreys* v. *Roberts*, 5 B. & A. 407.

3. A testator in 1814, after devising to his wife for life the mansion in which he then lived, together with all the buildings and lands thereunto belonging, *as then enjoyed by him*, with all the appurtenances, devised as follows:—"And from and after her decease, then I give and devise all my said mansion called *D.*, *with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances*, unto my godson *J. S. B.*, his heirs and assigns, for ever." The testator had purchased the estate called *D.* in 1772, and in 1792 purchased an adjoining estate called *U. H.*; and in two years afterwards took several closes, forming part of the latter estate, into his own occupation; and after removing the fences, continued to occupy the same until the time of his death, the additional closes having in the interim been always known by the name of the "*D.* meadows:"—Held, that under this devise the additional closes passed to the godson. *Bodenham* v. *Pritchard*, 2 Dow. & Ryl. 508.
S. C. 1 B. & C. 350.

4. Where a testatrix by her will devised all her real property to *A. T.* and *E. O.*, (except what she might mention in a codicil), means except what she shall have mentioned in a valid codicil; and a testatrix, having made a codicil, (which was void from being unattested,) devising part of her real estate to other persons:—Held, that notwithstanding this, the whole of the real property passed to the devisees under the will, and not to the heir-at-law. *Denn* v. *Taylor*, 2 Chit. 681.

5. *John Luscombe*, by his will, devised his estates in trust to his nephew *John Luscombe Manning* for life, he taking and using the testator's sirname, subject as to some part of the premises to a charge, and to the powers and remedies appointed for the recovery of the same; and from and after the forfeiture, or other determination of such estate for life, to trustees, in trust, to preserve contingent remainders; and first, to the use of the first son of his nephew, and the heirs male of his body lawfully to be begotten, "taking and using the testator's sirname, as and for his and their own sirname;" and in default of such issue, to the use of the second, third, fourth, fifth, and all and every other son and sons of the body of his said nephew, and to the heirs male of their respective bodies, severally "taking and using the tes-

tator's sirname, as and for his and their own sirname;" and in default of such issue, then to the use of the other sons of his nephew's mother, and to the heirs male of their respective bodies, severally and in succession, "taking his sirname;" and in default of such issue, then to their mother *Margaret Manning* for life; remainder to his niece *Mary Creed* for life; remainder to the heirs male of her body; remainder to his cousin *John Luscombe Ryan* for life; remainder to the first and other sons of the latter, in like manner as to the first and other sons of the first devisee, each taker, and their heirs respectively, "taking and using the testator's sirname;" remainders over to persons of the testator's name, with an ultimate remainder to his own right heirs.—Then followed an express provision that the heirs male of the several body and bodies of *M. M.* the mother of the first devisee *M. C.*, his niece, and that his cousin *J. L. R.*, and the heirs male of his body, and each and every of them respectively claiming under the will, should take to himself or themselves the name of *Luscombe*, and should, within three years next after obtaining possession of the estate, get and procure his and their own name and names to be altered to the name of *Luscombe* by act or acts of Parliament, or some other effectual way for that purpose, and should for ever after use and bear that name; and in case of negligence in this respect by such person or persons respectively, then the limitation to the defaulter to become absolutely void, and go over to the next remainder-man complying with the said proviso. The first devisee, before he became of age, or was let into possession of the estate, took upon himself the name of *Luscombe*, and had ever since borne and used it, but had never obtained any act of Parliament authorising him to change his name:—Held, that the omission by the first devisee to obtain an act of Parliament to alter his name, within three years after he had come into possession, did not operate as a forfeiture after the estate had vested in him, the provision with respect to the alteration of his name having been substantially complied with. *Doe d. Luscombe* v. *Yates*,
1 Dow. & Ryl. 187.

S. C. nomine Doe d. Luscombe v. *Young*,
5 B. & A. 544.

And see *S. C.* 2 Swanst. 375.

6. Where a testator, having both real and personal estate, after giving several pecuniary legacies, gave and bequeathed all the rest and *residue* of his *estate* and *effects*, whatsoever and wheresoever, to trustees, their executors, &c. upon trust, that they should, out of such residue of the monies and effects which he should die possessed of, manage and cultivate the farm, then in his possession, for the remainder of his term therein, for the joint advantage of his four sons and two daughters in his will named; and, at the expiration of the term, on further trust, to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his farm, and divide the money arising therefrom among his said sons and daughters:—Held, that the testator's real estate did not pass by the will, as he meant that his personal property only should go to his trustees. *Doe d. Hurrell* v. *Hurrell*,
5 B. & A. 18.

7. A testator being possessed of freehold and leasehold property in the parish of *D.* where he resided and made his will, and also of similar property in the parishes of *S.* and *W. A.*, made his will, and charged his debts, legacies, and funeral expenses, on all his real estates, and then gave to his nephew *T.* a legacy of 700*l.*, and to his nephew *J.* (his heir-at-law) a legacy of 20*l.*, to be paid by his executor; and then appointed his youngest nephew *R.* his whole and sole executor of "all his lands for ever, and leasehold property *here*, or at *B.*, or money that shall become due for the same, paying *M. B.* 12*l.*, and testator's sister *E. G.* 20*l.* *per annum*, payable half-yearly:—Held, under this devise, that his executor and nephew *R.* took all the freehold property of which he died seised. *Right d. Gillard* v. *Gillard*, 1 Dow. & Ryl. 464.
S. C. nomine Doe d. Gillard v. *Gillard*,
5 B. & A. 785.

8. A testator, after devising to his nephew *H. W.* a messuage, forming part of his real estate, devised as follows:—"Item, I give *further* unto my nephew *H. W.* half part of my garden, and 100*l.* stock in the four *per cent.* bank annuities. *I give further my yard, stable, cowhouse, and all other outhouses in the said yard, my sister M. W. to have the interest and profits during her natural life:*"—Held, that under this bequest *H. W.* after the death of *M. W.* took an estate in fee in the yard, &c. to the

exclusion of the testator's heir-at-law. *Doe d. Wickham* v. *Turner*, 2 Dow. & Ryl. 398.

9. A testator devised a portion of his lands to his daughters *E.* and *A.* to be equally divided between them at his death; and willed, that at their respective deaths, their respective shares should be equally divided between their several and respective children; but if *A.* died without issue, then he gave her share to *E.* for life; and at her decease to her children, share and share alike. He then gave to all his grandchildren, who should be living twelve months after his death, 5*l.* each. The residue of his real and personal estate he gave to his only son *B.*; but if he died without issue, then he gave his share of the estate to all the grandchildren who should be then living, share and share alike. He then introduced certain qualifications respecting the devises he had so made, and for the first time mentioned any of his grandchildren by name. He directed, first, that such of these *last* shares as should belong to his grand-daughter *E. S.* should be placed in the hands of her father *W. O.*, his executors or assigns; the interest to be paid her during her life, and at her death the principal to be divided among her children, share and share alike. Next, he specifically directed that such share or shares of the land he had devised to his daughters *E.* and *A.*, and likewise such share or shares of money as might become due by virtue of the will to his grandson and grandaughter, *Robert* and *Hannah*, (children of his daughter *E.*) should be placed in the hands of their brother *James*, his heirs or assigns, to pay the rents, &c. to them during their lives; and after their death, his or her respective shares to be equally divided among his or her children, if such there were: if not, such shares to become the property of *his or her heirs or assigns for ever:* — Nevertheless, if the brother *James* should at any time thereafter think right and proper, he might deliver up to *Robert*, at *any sooner period, all or any part of his share or shares, unto his only proper use, his heirs and assigns for ever:*—Held, that if the disposing part of the will did not give an estate in fee to the testator's daughters *E.* and *A.*, and their children, yet it was clear from the qualifying parts, that such was his intention, and consequently, that the children of *E.*, (*A.* having died without issue,) took an estate in fee in the land so devised to their mother. *Doe d. Orpe* v. *Frost*, 2 Dow. & Ryl. 678. *S. C.* 1 B. & C. 638.

10. Where a testator devised a copyhold estate to his wife for life; remainder to his son, and his heirs; and there was no custom in the manor for entailing copyholds; and the son survived his mother, and had issue:—Held that at common law, he took a fee simple conditional. *Doe d. Spencer* v. *Clark*, 5 B. & A. 458. *S. C.* (not *S. P.*) 1 Dow. & Ryl. 44.

11. Under a devise as follows: "And as touching my real estates, both freehold and leasehold, situate &c., I devise the rents and profits thereof to my executors hereafter named, until my daughters attain their several ages of twenty-one years, in trust that they, my executors, improve the same in like manner and purpose as I ha[ve] hereby directed my personal estate, for the advantage and education of my daughters: and as to the freehold and inheritance of my real estate, I devise the same to my said daughters, when and as they attain their several ages of twenty-one years, equally between them and their heirs for ever, to take as tenants in common: provided that if both my daughters die without lawful issue, then I devise my real estates unto and amongst my said two brothers *T. S.* and *R. S.*, and my nephew *J. S.* son of my late brother *J.*, their heirs and assigns for ever, to take as tenants in common;"—Held, that the daughters only took an estate tail with remainders over. *Chapman d. Scholes* v. *Scholes*, 2 Chit. 643.

12. A devise of lands to *S. S.* to hold the same unto *S. S.* and the heirs of his body, and their heirs for ever, chargeable with a legacy; but in case the said *S. S.* should die without leaving issue of his body, then a devise of the lands unto *W. S.* to hold unto the said *W. S.* and his heirs for ever; also chargeable with such legacy;—creates only an estate tail in *S. S.* with a vested remainder over. *Den d. Geering* v. *Shenton*, 2 Chit. 662.

13. Under this devise, "I do give to my son *Richard* the perpetual advowson of *Husbands Bosworth* in *Leicestershire*, and my manor of *Stanwick* and all my lands in *Northamptonshire*:"—

Held, that an estate for life only in the advowson passed to the devisee, although he was the incumbent of the living at the time the will was made, and also one of the residuary legatees;—on the ground that the words "perpetual advowson" were only descriptive of the thing devised, and not as denoting the quantity of interest which the devisee was to take therein. *Pocock* v. *Lincoln (Bishop)*, 6 Moore 159. *S. C.* 3 Brod. & Bing. 27.

14. A testator being possessed of real and personal property, devised the former to his three daughters in separate and specific portions, and directed the latter to be sold and divided between them, share and share alike, as soon as they respectively attained the age of twenty-two, the interest to be applied to their maintenance and education during minority; and as to the real property so devised, he directed as follows: *viz.* that "in case either of his three daughters *E.*, *A.*, or *S.*, should die before twenty-two, or die single, or before marriage, the portion of the deceased should be equally divided between the survivors, share and share alike, or their heirs: also, that in case two of his daughters should die without heirs, then that the whole should devolve to the surviving one and her heirs, *in case no husband was living; if so, they should enjoy the property during life only*, and afterwards her or their fortune should go to the heir or heirs of their sister, as heirs-at-law. He also made this reservation, that "in case all his three daughters should die without heirs and leave no husband living, or at the decease of the said husband or husbands, should it happen such then exist, he gave out of the before-mentioned *estates* 100*l.* each to *W. A.*, *R. A.*, and *E. A.*, &c. Also he gave *in such case, only as above*, 100*l.* to *S. G.*, and 20*l.* to *J. G.* &c.; and that if *this* should so happen when those legacies were so paid, he left and gave all the residue of his *estates* that should remain to be sold and equally divided, share and share alike, amongst his three brothers *J.*, *E.*, and *G. H.*, and sister *S. B.*, or their heirs, share and share alike."—The testator's daughter *E.* died unmarried before twenty-two; the daughter *A.* married the defendant after twenty-two, and died without issue; and the daughter *S.* also married after twenty-two, and died leaving issue:—Held, that under this will the husband of *A.* took an estate for life by implication in the estate given to his wife, and also an estate for life in the moiety of *E.*, the unmarried sister's estate; and that the residuary clause and gifts over did not control the previous directions with respect to the daughters' husbands. *Doe d. Driver* v. *Bowling*, 1 Dow. & Ryl. 367. *S. C.* 5 B. & A. 722.

15. A testatrix as for her *temporal estates* and effects gave and disposed of the same in manner following: *viz.* she bequeathed to *L. C.* 4*l.*, and to *M. H.* 3*l.*; which legacies she directed to be paid by her executor within three months after her decease: also she gave, devised, and bequeathed to *J. G.* all her lands, tenements, and hereditaments, particularly those called *B.* and *C.* situate in *P.* which were lately the lands of her husband; and all the rest and residue of her goods and chattels, personal and *testamentary estate* and effects whatsoever, she gave and bequeathed to the said *J. G.* whom she appointed sole executor of her will:—Held, that *J. G.* took a fee in the lands of *B.* and *C.*; it being the intention of the testatrix, as collected from the will, to dispose of all her property; and that the words "testamentary estate" in the residuary clause, connected with those of "temporal estates" in the introductory clause, were sufficient to convey such an estate, although the clause devising the lands would give him an estate for life only. *Doe d. Penwarden* v. *Gilbert*, 6 Moore 268. *S. C.* 3 Brod. & Bing. 85.

IV. WHAT WORDS PASS AN ESTATE IN FEE.

See *Doe d. Penwarden* v. *Gilbert*, *suprà*. See also *Doe d. Orpe* v. *Frost*, 2 Dow. & Ryl. 678. *S. C.* 1 B. &C. 638. Ante, last page.

1. A testatrix being seised in fee of an undivided fifth part of an estate, and of a moiety of another undivided fifth part, devised as follows: "my *share* of the *B.* and other estates, situate at C., and now in the occupations of *T.* and *C.*, to my sister *C. W.*:"- Held to pass a fee. *Paris* v. *Miller*, 5 M. &. S. 408.

2. *R. L.* by will devised all his lands to trustees, and bequeathed 10,000*l.* as a portion to his daughter *C. L.*; but in case she should marry any one of his three kinsmen named in the will, he gave to whichever of them she married, certain estates therein specified, he

taking the name of *L.*, and settling upon her an annuity of 1000*l.* a year during her life: and in case that circumstance did not take place with his daughter *C. L.*, he then directed that it might be offered to his other daughter, *A. L.*, in like terms: and in case neither daughter should marry in the above manner mentioned, then he directed that his daughters should have 10,000*l.* each; and in that case he gave all his estates to *W. D. his kinsman, for ever, on his and his heirs* taking the name of *L.* irrevocably.—After the date of the will the daughter *C. L.* married one *W. H.*, who was not one of the persons named in the will, who would have become entitled to the estate after she married him, and the testator paid her a marriage portion; and afterwards by a codicil to his will, reciting her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which *W. H.* might have to any of his real and personal estates, by virtue of his marriage with the testator's daughter C. L.; and by virtue of his will, and in lieu thereof, he bequeathed unto each of their children a pecuniary legacy; and then directed that in case his other daughter should marry either of the persons mentioned in his will, then upon condition that either of those persons whom she married, and his heirs, would accept, take, and use the name of *L. only*, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter *A. L.* should not marry either of those persons, or if she married one of them, and he refused to take and use the name of *L.*, in that case he revoked all his devises and bequests contained in his will and codicil in her favour, and in lieu thereof bequeathed her 10,000*l.* The testator died soon after the date of his codicil, and his daughter *A.L.* afterwards married *T. F.*, who was not one of the persons named in the will who would have been entitled to the estate in the event of her having married him; and upon that occasion the 10,000*l.* was paid to her, and *W. D.* then entered upon the testator's estates, and took upon himself the name of *L.*, and suffered a recovery:—Held, that *W. D.* was seised of an indefeasible estate in fee simple. *Lowe* v. *Manners (Bart.)*, 5 B. & A 917.

3. Where a testator, after bequeathing a specific legacy, devised all and every other part of his real and personal estate to be equally divided between his three grandchildren, share and share alike, for ever; and that if either of them should happen to die without children, then that such share of the one so dying should be equally divided amongst the surviving grandchildren; but that if any of his grandchildren should die and leave children, that such children should have their parents' share equally divided amongst them, share and share alike:—Held, that the grandchildren took an estate in fee simple, as tenants in common. *Clayton* v. *Lowe*, 5 B. & A. 636.

V. WHAT WORDS PASS AN ESTATE TAIL.

See also Ante, Div. III.

1. A testator devised his lands, charged with two annuities, and subject to certain legacies, to trustees, *their heirs and assigns*, until his nephew *J.*, son of his sister *M.*, should attain twenty-one; and if he should die in the mean time, until *H.*, second son of *M.*, should arrive at that age; and if *H.* should die in the mean time, until the daughter of *M.* should arrive at that age, upon trust to raise out of the rents of the premises, or by sale or mortgage thereof, portions for *H.* and the younger children of *M.*, payable on their attaining twenty-one; and further, to apply a proper sum out of the rents for the maintenance and education of *J.* until he should attain twenty-one, and then to pay him the residue; and if he should die before twenty-one, then to apply a like sum for the maintenance of *H.* till he should attain that age, and then to pay him the residue; and in the mean time to place out the money arising from the rents at interest, for the benefit of *J.*; and when *J.* should attain twenty-one, or in case of his death, when and as soon as *H.* should arrive at that age, or in case of his death, when the daughter of *M.* should attain twenty-one, to the use of *J.* and his assigns, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; and after the death of *J.*, to the use of his first and other sons and daughters in strict tail; and for default of such issue, to the use of *H.*, with similar limitations over, to his niece, the daughter

of *M.*, and an ultimate remainder to *M.* in fee.—The testator died, leaving his sister *M.*, her sons *J.* and *H.*, and three younger children, alive. *J.* married and died intestate under twenty-one, leaving a daughter:—Held, that the daughter of *J.* took an estate in tail male, on the death of her father. *Warter* v. *Hutchinson*, 3 Dow. & Ryl. 58.
S. C. 1 B. & C. 721.
(C. P.) 5 Moore 143.

2. Devise of certain estates to testator's daughter for life; and after her death, to her son *A. B.*, an infant, for life; remainder to trustees, to preserve contingent remainders: but nevertheless, to permit *A. B.* to receive the profits during his life; and after the decease of *A. B.*, then to the heirs of his body for ever; and for default of issue, then over:—Held, that *A. B.* took an estate tail in remainder. *Measure* v. *Gee*, 5 B. & A. 910.

VI. WHAT WORDS PASS AN ESTATE FOR LIFE.

See Ante, Div. III.

See also *Pocock* v. *Lincoln* (*Bishop*), 6 Moore 159. *S. C.* 3 Brod. & Bing. 27. Ante, page 104.

1. *A.* devised his estate to his nephew *John* for life; "and from and after his decease, *unto all and every the child and children* of the said *John* lawfully begotten, or to be begotten, *whether sons or daughters; they, if more than one*, to take as tenants in common, *in equal shares and proportions; and for want of such issue*, to his own right heirs for ever:"—Held, that *John* took only an estate for life; and that his children after his death took only an estate for life as tenants in common, and not an estate tail. *Doe d. Liversage* v. *Vaughan*, 1 Dow. & Ryl. 52.
S. C. 5 B. & A. 464.

2. Devise of all the devisor's messuages, lands and tenements, freehold and copyhold, to trustees, "to the use of his daughter for life; and after her decease, to the use of her issue; and in default of issue, or in case none of such issue should live to attain the age of twenty-one years," then over:—Held, that the daughter took a beneficial interest in the premises, for her life only. *Merest* v. *James*, 4 Moore 327.

3. Devise of all the testator's real and personal estates to his brother in fee, whom he appointed his executor and residuary legatee. By a codicil reciting the testator's will and the death of his brother, and that the testator was possessed of considerable fortune, both real and personal, he, after a devise of a term of years in *Ireland* to his nephew *J. B.*, devised all his estates and lands in *Hertfordshire*, *Finchley*, and *Middlesex*, to his nephew *G. E. B.*, and certain other lands in *Ireland* to his nephews *L. B.* and *C. B.*; and afterwards directed that his said nephews should not be entitled to the possession of the estates until they respectively became of age; and that if one or more of them should die, before attaining twenty-one, then he devised the estate of him or them so dying to his nephew *J. B.* and his issue lawfully begotten; and if *J. B.* should die without issue, then to his next brother, *G. E. B.*; and for default of such issue in *G. E. B.*, to his nephew *L. B.* and his issue; and in default of such issue in *L. B.*, to his nephew *C. B.* and his issue. There was a similar limitation to his nephew *S. B.* and his issue; and for default of such issue, to his niece and her issue, under such restrictions and limitations as she should think fit to dispose of the same amongst her issue, "it being the intent of the will to prevent waste, by making the several children of devisor's deceased brother tenants for life only." The codicil then gave power to the devisor's nephews to make reasonable settlements on their wives, and to dispose of their respective estates among the issue of such marriages as they should think proper to limit and appoint. He then bequeathed the residue not disposed of to his nephews and niece aforesaid, except his nephew *S. B.*, to be divided among them equally at their respective ages of twenty-one; the shares of him or them so dying to go to the survivor or survivors of them:—Held, that *G. E. B.* took an estate for life only, in the lands situate in the county of *Hertford*, devised to him by virtue of this will and codicil. *Bruce* v. *Bainbridge*, 5 Moore 1.

VII. CONDITIONAL OR CONTINGENT, WITH REMAINDERS OVER, AND HEREIN OF VESTED REMAINDERS.

See *Measure* v. *Gee*, 5 B. & A. 910. *suprà.*

1. Devise of an estate at *Irchester* to the devisor's grand-daughter *A.* for her

life; remainder to two trustees during the life of *A.* in trust only, to support contingent estates; and after her decease, to all and every the children in tail, with cross remainders between them in tail; and in default of issue of all and every the children of the devisor's grand-daughter, he devised to his daughter *B.* for life; remainder to such one or more of the children of *B.* as she by deed or will, attested by three witnesses, duly executed, should appoint, for their lives; remainder to all and every the child and children of such daughter or daughters, to be appointed by *B.* as aforesaid; and if only one should be appointed, then to her and the heirs of her body; and if more than one should be appointed, then all of them to take their mother's shares *per stirpes*, as tenants in common, and not as joint tenants, with cross remainders between them (the children of such daughters), as to their mother's shares in tail; and on failure of such issue of any one or more of such daughters, with cross remainders to the others of their issue: and in default of such appointment, and of any appointment not exhausting the whole fee, the devisor gave the estate at *Irchester*, or so much of the fee as should not be exhausted by such appointment made as aforesaid, to *B.* for life; with remainder to all her daughters for their lives, with cross remainders between them for life; with remainder during the lives of all the daughters of *B.* and the life of the survivor, to support contingent remainders; and for default of issue of any or either of the daughters then living of *B.*, he devised the said estate to *B.* and her heirs. *A.* died sole and intestate, leaving *B.* her heir-at-law as well as the heir-at-law of the devisor. *B.* had issue nine daughters, many of whom were married and had issue:—Held, first, that *B.* had in the freehold and copyhold lands of the devisor, an estate for her life, with an ultimate reversion to herself in fee. Secondly, that in default of appointment, her daughters then living had respectively, in the said lands of the testator, estates for life in remainder, as tenants in common, with cross remainders amongst themselves for life, with remainder to themselves in tail respectively. Thirdly, that in default of appointment, the grandchildren of *B.* had no estate in the testator's said lands. Fourthly, that *B.* had power by appointment to designate which one or more than one of her daughters was or were to take under the will; that if one daughter only was designated, she would take under the will in tail; but if more than one was designated, they would take under the will as tenants in common for life, with remainder to their respective children as tenants in common in tail, with cross remainders between them (the children of the appointed daughters) in tail; such cross remainders to take place as well with regard to the shares of their respective mothers, as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts. *Medlycott* v. *Jortin*, 6 Moore 1.

2. A testator devised his lands, charged with two annuities, and subject to certain legacies, to trustees, their heirs and assigns, until devisor's nephew *A.*, son of his sister *B.*, should attain twenty-one; and if he should die in the mean time, until *C.*, second son of *B.*, should arrive at that age; and if *C.* should die in the mean time, until the daughter of *B.* should attain twenty-one, upon trust, to raise out of the rents of the premises, or by sale or mortgage thereof, portions for *C.* and the younger children of *B.*, payable on their attaining twenty-one; and further, to apply a proper sum out of the rents for the maintenance and education of *A.* until he should attain twenty-one, and then to pay him the residue; and if he should die before twenty-one, then to apply a like sum for the maintenance of *C.* till he should attain that age, and then to pay him the residue, and in the mean time to place out the money arising from the rents at interest for the benefit of *A.*; and when *A.* should attain twenty-one, or in case of his death, when and as soon as *C.* should arrive at that age, or in case of his death, when the daughter of *B.* should attain twenty-one, to the use of *A.* and his assigns for life, *sans waste;* remainder to trustees to preserve contingent remainders; and after the death of *A.* to the use of his first and other sons and daughters, in strict tail; and for default of such issue, to the use of *C.* with similar limitations over to his niece, the daughter of *B.*, and an ultimate remainder to *B.* in fee. The devisor also directed that his plate and furniture should remain in his house as heir-

looms. He died, leaving his sister *B.*, her sons *A.* and *C.*, and three younger children, alive. *A.* married and died intestate under twenty-one, leaving a daughter, *D.*:—Held, first, that *D.* became entitled to the estates devised, as tenant in tail, immediately on the death of her father, subject to the annuities and legacies as charged by the will. Secondly, that the heir-looms being personalty, vested absolutely in her on the death of her father. And thirdly, that the personal representative of *A.* was entitled to the savings of the rents and profits of the estates accrued in his lifetime, subject to the said annuities and legacies. *Warter* v. *Hutchinson*, 5 Moore 143.

3. Held also, on another argument in the Court of *King's Bench*, that on the death of the testator, *A.* took a vested estate for life; and that *C.*, at such death, took a vested estate for life in remainder, expectant on the death of his mother *A.*, and failure of sons and daughters, and issue male of such sons and daughters. *Warter* v. *Hutchinson*, 3 Dow. & Ryl. 58. *S. C.* 1 B. & C. 721.

4. Where a testator was possessed of considerable personal property, and seised of an undivided third part in certain messuages and lands under a demise for lives, devised the latter and all his real estates to his sister and nephew for their joint lives, and to the survivor of them during her or his life, in case there should be no lawful issue living of them, or either of them; but in case both or either of them should leave any such issue, then to the survivor of the sister and nephew one undivided moiety only of the said real estate for and during her or his life; and the rents and profits of the other undivided moiety to be paid and applied to the maintenance and education of all and every the child and children of either of them the sister and nephew so dying, during their several minorities; and after the death of such survivor of the sister and nephew, the remaining moiety of the said estate was to be paid and applied in like manner, if there should be occasion, to all and every the child and children of such survivor of the sister and nephew, during their several minorities; and *when and as* such several children of the sister and nephew respectively (if any such there should be) should respectively attain their age of twenty-one, then the whole of the said real estate was devised unto and equally amongst all such children of the sister and nephew respectively, share and share alike; if more than one, as tenants in common, and to their respective heirs and assigns for ever; and if but one, to such only child, his or her heirs and assigns for ever; but in case the sister and nephew should both die without *leaving issue* of her or his body, or there being such issue they should happen to die under twenty-one, and without issue, then the said estate was given to *G.M.* his heirs and assigns for ever.—The nephew and sister being the testator's co-heirs at law, and the former having one daughter, and the sister being unmarried;—for the purpose of destroying the contingent remainder expectant on the life estates, by merger of such life estates in the reversionary estates, as co-heirs by bargain and sale conveyed the premises discharged from all the contingent interest devised by the will to the uses therein declared; that is to say, to such uses as they should jointly appoint; and in default thereof, upon such further uses for the benefit of the nephew and sister respectively, as were therein mentioned: Held, first, that the daughter of the testator's nephew took upon the death of the testator, and under his will, an estate in fee simple in remainder during the lives of the *cestui que vies*, in the undivided third part of the said messuages and lands comprised in the said indenture of demise, subject to be divested in part by the birth of other children of the nephew and sister, or of either of them, and determinable altogether, in the event of her dying in the lifetime of the nephew (her father) or under twenty-one, without leaving issue: secondly, that the conveyance did not pass any estate or interest which could in any way defeat or affect the remainder so vested in the daughter of the testator's nephew. *Machin* v. *Reynolds*, 6 Moore 455. *S. C.* 3 Brod. & Bing. 121.

VIII. LIMITATION OVER, HOW CONSTRUED.

1. Devise of freehold and leasehold property to *A.* for ninety-nine years, if he should so long live; remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on respectively and progressively in tail male to such first son lawfully

issuing for ever; and in default of issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of *A.* at the time of his death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to *B.* for ninety-nine years, if he should so long live; remainder to the first son of *B.* for ninety-nine years, if he should so long live:—Held, that *A.* took under the will an estate for ninety-nine years in the freehold estates, determinable with his life; and the same estate in the leasehold, if they should so long continue; and that upon his death, his first son would take a like estate in the freeholds, and the remainder of the terms in leaseholds: but that the limitations to the second and other unborn sons of *A.* were void as tending to perpetuity; and that the limitations over, after these void limitations, were also void. *Beard* v. *Westcott,* 5 B. & A. 801.

IX. EXECUTORY DEVISE.

1. Devise of lands to *J. N.*, his heirs and assigns for ever; and if he should happen to die without any lawful issue by his then wife, or any after wife or wives, the lands before given to him and his heirs after his death, and his wife or wives aforesaid, were to go and remain to all the children of *M. D.*, share and share alike, to hold as tenants in common:—Held, that *J. N.* having died without issue in the life-time of the testatrix, but leaving a widow who survived the testatrix, the remainder to the children of *M.D.* which would have been contingent if *J.N.* had survived the testatrix, might take effect as an executory devise, so as to preserve the limitation to the children of *M.D.*; and that such children of *M.D.* living at the time of the testatrix, together with an after-born child, took an estate for life in equal shares at the death of the widow of *J. N.*; and that the shares of such of the children as died after the testatrix, and before the widow of *J. N.*, did not pass to the survivors, but went to the heir-at-law of the testatrix. *Doe d. Scott* v. *Roach,* 5 M. & S. 482.

DISCONTINUANCE.

I. OF ESTATE.

1. Discontinuance can only be created by a tenant in tail in possession, at the time he does the act to defeat the settlement; therefore, where a marriage settlement conveyed certain premises to trustees, their heirs and assigns, in trust, for the joint lives of *A.* and his wife, and the life of the survivor; remainder to the use of the trustees and their heirs, for the joint lives of *A.* and his wife, and the life of the survivor, to preserve contingent remainders; remainder to the use of one of the trustees, his executors and administrators, for five hundred years, to raise a sum of money for the younger children of the marriage, by sale or mortgage of the estate; remainder to the use of the heirs of the body of *A.*, begotten on the body of his wife; remainder to the use of *A.*, his heirs and assigns, for ever; and *A.*, during the continuance of his life estate, granted a lease of the estate for three lives, with livery of seisin, to *B.*:—Held, that this did not work a discontinuance of the settlement in tail, the intermediate estate to the trustees being vested. *Doe d. Jones* v. *Jones,* 2 Dow. & Ryl. 373. *S. C.* 1 B. & C. 238.

II. OF ACTION.

See also *Paine* v. *Gawdery,* 3 Dow. & Ryl. 33. Ante, page 21.

1. The plaintiff on the 6th *February* took out a rule to discontinue his action upon payment of costs, to be taxed by the Master; and on the 7th, an appointment was made by the Master, but the costs were not taxed and paid until the 11th *March.* On the 29th *January* pre-

ceding, the defendant in that action sued out a writ against the plaintiff for a malicious arrest, and filed his bill on the 8th *February*; and it being objected that the latter action was brought before the first was discontinued:—Held, that it was not; and that when the judgment of discontinuance was entered, it had relation back to the day when the original rule to discontinue was taken out. *Brandt* v. *Peacocke*, 3 Dow. & Ryl. 2. *S. C.* 1 B. & C. 649.

DISSEISIN.

See *Doe d. Souter* v. *Hull*, 2 Dow. & Ryl. 38. Post. tit. EJECTMENT.

DISSENTERS.

1. It seems that the 53 *Geo.* 3, c. 160, does not alter the common law with respect to impugning the doctrine of the *Trinity*, but only removes the penalties imposed on persons denying such doctrine, by 9 & 10 *Will.* 3, c. 32, and extends to such persons the benefits conferred on all other protestant dissenters, by 1 *Will. & Mary*, sess. 1. c. 18. *Rex* v. *Waddington*, 1 B. & C. 26.

DISTRESS.

I. WHO MAY DISTRAIN.

See *Stanley* v. *Fielding*, 5 B. & A. 425. Post. tit. TURNPIKE.

1. A landlord cannot distrain unless there be an actual demise to the tenant at a specific rent. *Dunk* v. *Hunter*, 5 B. & A. 322.

2. One of several co-heirs in gavelkind may distrain for rent due to himself and his co-heirs, without an express authority from them so to do. *Leigh* v. *Shepherd*, 5 Moore 297.

3. The collector of the personal assessed taxes may, by the statute 43 *Geo.* 3, c. 99, s. 33, distrain " the *person* or *persons* so charged under that statute, by *his* or *their* goods and chattels, and all such other goods and chattels as they are by the statute authorised to distrain;" and by the 38th section, the remedies given by the bankrupt laws, are extended to the collector, for enforcing the payment of the same taxes. *Shaftesbury* (*Earl*) v. *Russell*, 3 Dow. & Ryl. 84. *S. C.* 1 B. & C. 666.

II. WHAT MAY BE DISTRAINED.

1. Goods of a principal in the hands of a factor for sale, are privileged from distress for rent due from such factor to his landlord; on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain; and therefore, that such goods are protected for the benefit of trade. *Gilman* v. *Elton*, 6 Moore 243. *S. C.* 3 Brod. & Bing. 75.

2. Where *A.* by the trusts of his father's will, was allowed to use the furniture in the mansion of *B.* during his natural life, and was prohibited from removing it thence without the consent of the trustees:—Held, that such furniture could not be distrained for *A.*'s personal taxes, returned as payable at the mansion of *B.*; and that it did not

fall within the description of such "other goods and chattels" as might be distrained by force of the thirty-third section of the 43 *Geo.* 3, c. 99. *Shaftesbury* (*Earl*), v. *Russell*, 3 Dow. & Ryl. 84. *S. C.* 1 B. & C. 666.

3. Where a *British* born subject, employed as first chorister at the *Portuguese* ambassador's chapel, with a salary, rented and occupied a house, and let part of it in lodgings, and a distress was levied on his goods for a poor-rate:—Held, that they were not protected by the statute 7 *Anne*, c. 12, even assuming him to be a domestic servant of the ambassador, as such goods were not necessary for the convenience of the ambassador. *Novello* v. *Toogood*, 2 Dow. & Ryl. 833. *S. C.* 1 B. & C. 554.

4. By an inclosure act, the tithes payable in respect of certain old inclosures were extinguished, and in lieu thereof a *corn-rent* substituted, which was directed to be paid for ever afterwards to the impropriator and vicar, by the person, who for the time being, should be in the possession *or* occupation of the land out of which the rent should be issuing ; and a power of distress was given for the recovery thereof, the same as for rent service, or other rent in arrear :—for several years, part of such land remained untenanted and wholly unprofitable to the owner, who during that time, resided elsewhere :—the land was then demised to a tenant, who entered and brought it into cultivation : —Held, that the goods of the tenant, coming in under him, were liable to be distrained for such rent in arrear. *Newling* v. *Pearce*, 2 Dow. & Ryl. 607. *S. C.* 1 B. & C. 437. And see *Bendyshe* v. *Pearce*, 4 Moore 99.

III. DISTRESS.

(*a*) *How made and disposed of.*

1. A distress on growing crops of corn of the vendee of sheriff, for rent accruing due to the landlord subsequently to the entry under the execution and sale, cannot be sustained, unless such vendee allow the crops to remain uncut an unreasonable time after they have become ripe. *Peacock* v. *Purvis*, 5 Moore 79.

2. Where a landlord distrained beasts of the plough, though there were other goods on the premises, he is not liable to an action for an illegal distress, if he used due diligence to ascertain whether such goods were a sufficient distress without them; and he is not to be affected by a subsequent sale at a higher price than was expected. *Jenner* v. *Yolland*, 2 Chit. 167. *S. C.* 6 Price 5.

(*b*) *How pleaded.*

1. A plea of distress to an action for use and occupation, is no answer, unless it states how long the distress was retained, or that it was legally taken. *Deare* v. *Edmunds*, 2 Chit. 301.

2. Where, to a declaration in *assumpsit* for coals obtained by the defendant from the plaintiff's pit, the former pleaded that the plaintiff had distrained his goods for the same identical cause of action :—Held bad, on special demurrer, assigning for cause, that it did not appear by the plea that all the plaintiff's damages were satisfied. *Lees* v. *Wright*, 1 Dow. & Ryl. 391.

(*c*) *Right of, where waived.*

1. An agreement to take interest on rent in arrear, does not take away the landlord's right of distress. *Sherry* v. *Preston*, 2 Chit. 245.

(*d*) *Excessive, Remedy for.*

1. Case is a good form of action for an excessive distress for rent, though the tenant had tendered the rent due to his landlord before the distress was levied. *Branscomb* (*Lady*) v. *Brydges*, 2 Dow. & Ryl. 256. *S. C.* 1 B. & C. 145.

IV. FRAUDULENT REMOVAL OF GOODS.

1. In an action against the defendant, (a third person,) sued under the 11 *Geo.* 2, c. 19, s. 3, for the double value of goods, for assisting a tenant in carrying off and concealing his goods and chattels: —The Court of *Exchequer* held, that after a verdict for the defendant they might notwithstanding grant a rule calling on him to shew cause why there should not be a new trial, where the Jury had found for the defendant against the evidence reported to have been given in the cause: and the fourth section of the same statute, authorising the landlord to apply to magistrates, and empowering them to proceed to determine the matter, when the value is under 50*l.*, in a summary manner, and to issue their warrant

to levy the amount adjudged by distress, does not oust the superior Courts of their jurisdiction; and it seems that it is not necessary to shew, in proof of concealment of cattle, that they were withdrawn from sight; if they have been removed to a neighbour's field, so as to cause the landlord difficulty to find them, it is sufficient. *Stanley (Bart.)* v. *Wharton*, 9 Price 301.

DOCKS.

See also tits. { AUCTION, TRUSTEES.

1. By the Acts of Parliament passed for building, improving, and maintaining the *Liverpool Docks*, the corporation (who are trustees for the purpose of carrying them into execution) are authorised to levy certain rates and duties on the ships and vessels entering and going out of the port of *Liverpool*: and they are empowered to borrow money, not exceeding 600,000*l*., for the maintenance of the docks by sale (by auction) of assignments of the rates and duties so imposed on the shipping, securing to the purchasers 100*l*. each, with interest till paid:—Held, that such assignments were not a mere chattel, but a charge upon the docks; and therefore, an interest in land. *Rex* v. *Winstanley*, 8 Price 180.

2. And under the statute 51 *Geo.* 3, c. 143, a ship which cleared outwards from *Liverpool* to *St. Domingo*, where she discharged her cargo; reloaded for *London*, and there discharged that cargo; loaded again for *Liverpool*, and arrived there with the last-mentioned cargo,—was held liable to pay a dockage rate, according to the rate payable from *London* only, and not from *St. Domingo*. *Liverpool Docks (Trustees)* v. *Gladstone*, 5 M. & S. 328.

DOWER.

1. Where lands were conveyed by *A*. to such uses as *B*. should by deed appoint; and in default of, and until appointment, to the use of *B*. in fee; and *B*. afterwards, in execution of the power, conveyed the said estates by deed of appointment to *C*. in fee; and *B*., at the time of making the appointment, was married:—Held, that his wife was not dowable out of these lands, in case she survived him. *Ray* v. *Pung*, 5 B. & A. 561. S. C. 5 Mad. 310.

EJECTMENT.

I. TITLE OF LESSOR.

See also Ante. tit. CLERGY.
Div. II. Post. next page.
Post. tit. LEASE.

1. *H. S.* devised his estate to his wife in fee, and died seised, leaving his widow and two sons him surviving. After his death, the widow and the younger son,

by deed of bargain and sale, conveyed the estate in fee to *H.* without the privity of the eldest son and heir-at-law of the testator. *H.* continued in undisturbed possession of the estate for twenty-two years, and died possessed, bequeathing it to his children. Six years after *H.* entered into possession, *W. S.* the eldest son and heir-at-law of *H. S.*, made his will, and devised all his real estate to his wife, and to his younger brother in trust for the life of the wife, and then to his children, and died three years afterwards, without ever disturbing *H.*'s possession:—Held, that the trustees might maintain an action of ejectment to recover the possession of the estate, notwithstanding the quiet enjoyment of *H.* for twenty-two years. *Doe d. Souter* v. *Hull*, 2 Dow. & Ryl. 38.

2. Where *A.* entered into an agreement with *B.*, to sell land then in the possession of the latter, on certain terms; and to execute a conveyance in case *A.* should be found owner thereof, and could make a good title thereto; and agreed that in the mean time *B.* should remain in possession:—and *A.* afterwards brought an action of ejectment against *B.*, to try the title, without having demanded possession, or otherwise determined *B.*'s tenancy:—Held, that the action was not maintainable. *Doe d. Newby* v. *Jackson*,

2 Dow. & Ryl. 514.
S. C. 1 B. & C. 448.

3. A copyholder, who had done fealty and attorned tenant to the lord of a manor, cannot, in ejectment, impeach the lord's title by setting up the right of a third person, unless the latter joins in resisting the title of the lessor of the plaintiff. *Doe d. Nepean (Bart.)* v. *Budden*, 1 Dow. & Ryl. 243.
S. C. 5 B. & A. 626.

II. ACTION OF, BETWEEN LANDLORD AND TENANT.

1. Where a tenant died intestate, in the possession of certain premises, and his widow, after continuing to occupy them for several years, and paying rent to the landlord, married a second time, and her husband entered into possession and paid rent for several years to the landlord; and upon the death of the wife, the personal representative of the first husband obtained administration of his estate and effects, and brought an action of ejectment to evict the second husband:—Held, that the action was maintainable, without giving a formal notice to quit. *Doe* v. *Bradbury*,

2 Dow. & Ryl. 706.

2. A tenant may shew his landlord's title at an end, in ejectment brought against him by the latter: but where such action was brought by the reversioner, whose interest was the same as that of the tenant for life, and the tenant had paid rent to the reversioner:—Held, that he could not shew that the reversionary interest was at an end; but he might shew some prior title in the person under whom he claimed to hold. *Doe d. Colemere* v. *Whitroe*,

1 Dow. & Ryl. N.P.C. 1.

3. A demand of rent due from the lessee to the lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general, to sustain ejectment for a forfeiture for non-payment of rent, being lawfully demanded. *Doe d. Brook* v. *Brydges*,

2 Dow. & Ryl. 29.

4. The statute 1 *Geo.* 4, c. 87, for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants, does not extend to the case of a lessee holding over after notice to quit given by himself, where his tenancy has not expired by efflux of time. *Doe d. Cardigan* v. *Roe*, 1 Dow. & Ryl. 540.

5. And where a tenant holds from year to year, without a lease or agreement *in writing*, it is not within the first section of that statute. *Doe d. Bradford (Earl)* v. *Roe*, 5 B. & A. 770.

6. An agreement, *in writing*, of apartments for *three months* certain, comes within the meaning of the words 1 *Geo.* 4, c. 87,—where a party holds for any term or number of years certain, or from year to year. *Doe d. Phillipps* v. *Roe*,

1 Dow. & Ryl. 433.
S. C. 5 B. & A. 766.

7. The rule *nisi*, calling on a tenant to enter into a recognizance under that statute, need not specify all the particulars thereby required, as the Court may mould the rule conformably to its requisites in shewing cause.

1 Dow. & Ryl. 433.
S. C. 5 B. & A. 766.

8. A landlord entered into an agreement with a tenant on the 2d *January* 1815, to grant the latter a lease of certain premises for eight years, the agreement to take effect from the 10th *October* 1814; from which time the tenant

had been in possession, yielding 2*s.* 6*d.* yearly; and in case he held over after the term, he was to pay 40*s.* *per* day for every day he retained possession. The lease was never granted:—At the expiration of the term, the tenant held over, after having been served with a nine months' notice, to quit at the end of the year for which he held, which should first happen after the expiration of half a year from the date of the notice. He was then served with a written demand of possession; and the same paper notified to him, that if he did not yield quiet possession, an ejectment would be brought:—Held, first, that the tenant was not to be treated as a tenant from year to year; and secondly, that the demand of possession was sufficient notice within 1 *Geo.* 4, c. 37, so as to entitle the plaintiff to the benefit of the undertaking and security required by that statute. *Doe d. Anglesey (Marquis)* v. *Roe*, 2 Dow. & Ryl. 565.

9. And the time within which the undertaking and security required by that statute shall be given, is to be fixed by the Court at the time the rule is granted. *Doe d. Anglesey (Marquis)* v. *Brown*, 2 Dow. & Ryl. 688.

10. After a rule granted under that statute in a cause entitled "*Doe, &c.* v. *Roe*," to which the tenant in possession appeared,—judgment was entered up and execution taken out against the tenant by *name*:—Held no irregularity. *Doe d. Anglesey (Marquis)* v. *Brown*, 3 Dow. & Ryl. 230.

11. In proceeding in ejectment under the first section of the above statute, the Court of C. P. on making a rule absolute (no cause being shewn) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in *a reasonable sum*, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action;—ordered the tenant to appear in the next succeeding Term, to find such bail as were specified in the former rule; and on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute. The Court can only give a reasonable sum for the costs of the action, and not for the *mesne* profits, the amount of which must be ascertained by the Prothonotary. *Doe d. Sampson* v. *Roe*, (*Templeman, tenant*) 6 Moore 54.

III. DECLARATION AND SERVICE: AND HEREIN OF JUDGMENT AGAINST THE CASUAL EJECTOR.

See Ante, tit. AMENDMENT. III. also DIV. V. Post. page 118.

1. Where a declaration was entitled of a Term which had not arrived, and there was no date to the notice, further than the service of it:—Held to be an immaterial error. *Anonymous*, 2 Chit. 172.

2. But the Court will grant a rule for judgment against the casual ejector, where the declaration was entitled by mistake of a wrong Term, as *Hilary* instead of *Michaelmas*. *Anonymous*, 2 Chit. 173.

3. So if the title to a declaration is wrong, and the notice to appear thereto is correct, the defect in the title is cured. *Anonymous*, 2 Chit. 173.

4. Where the real defendant's name was inserted at the beginning of the declaration, instead of the casual ejector, a rule for judgment against the latter may be obtained; but the better course is to amend. *Anonymous*, 2 Chit. 173.

5. Where a declaration was entitled "*Doe on the demise of A. and B.* v. *B.*," and the affidavit of the service of the declaration on the tenant in possession was entitled "*Doe on the demise of B. and A.* v. *B.*;" the Court, notwithstanding the variance between the arrangement of the lessors' names, gave judgment against the casual ejector. *Doe d. Worthington* v. *Butcher*, 2 Chit. 174.

6. The statute 48 *Geo.* 3, c. 149, s. 2, requiring an office copy of the declaration to be written in the usual and accustomed manner, on which a duty of 4*d.* *per* sheet is imposed;—it not having been the practice to write such copies on both sides of the paper:—Held, that the service of seventeen office copies of declarations in ejectment, so written and delivered to as many tenants in possession, was irregular. *Doe d. Irwin* v. *Roe*, 1 Dow. & Ryl. 562.

7. Service of a declaration on two joint tenants who were also co-partners in trade, is not sufficient to entitle the plaintiffs to judgment against the casual ejector in the first instance, but there must be a rule to shew cause. *Doe d. Field* v. *Roe*, 2 Chit. 174.

8. And the Court granted a rule *nisi* where the service was on one of three tenants in possession, and the affidavits did not state them to be joint tenants. *Right d. ——* v. *Wrong*, 2 Chit. 175.

9. So, where the service was on one of two joint tenants. *Anonymous*, 2 Chit. 176.

10. And although service of the declaration on one of three several defendants is not sufficient, judgment may be obtained against the other two. *Doe d. Murphy* v. *Moore*, 2 Chit. 176.

11. Judgment signed against the casual ejector where the service of the declaration was upon the wife of the tenant in possession, who had left this kingdom and was settled abroad. *Doe* v. *Roe*, 1 Dow. & Ryl. 514.

12. Service of the declaration on the wife of the tenant in possession, without stating that it was served at the husband's house, or on the premises, is insufficient to support a rule for judgment against the casual ejector. *Right d. Bomsall* v. *Wrong*, 2 Dow. & Ryl. 84.

13. The Court granted a rule to shew cause why the service of the declaration on a son of the tenant in possession (who said that his father was unable to attend to any business, and a subsequent admission by a person who the deponent believed was the wife of the tenant in possession, that her husband had received it,) should be deemed good service. *Anonymous*, 2 Chit. 182.

14. So service of the declaration, by leaving it with the daughter of the tenant in possession (who was confined by indisposition), coupled with an affidavit that she acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother before the essoign-day of the Term, is sufficient for a rule *nisi* for judgment against the casual ejector. *Doe d. Roe*, 2 Dow. & Ryl. 12.

15. Service of a declaration on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, is sufficient for a like rule. *Doe d. Teverell* v. *Snee*, 2 Dow. & Ryl. 5.

16. But service of the delaration upon the servant of the tenant on a *Saturday*, with an acknowledgment by the tenant on a *Sunday*, is insufficient for judgment against the casual ejector. *Goodtitle d. Mortimer* v. *Notitle*, 2 Dow. & Ryl. 232.

17. Where a servant of the deceased tenant remains in possession, the plaintiff ought to endeavour to get possession; and if he resists, such servant may be treated as tenant, and the declaration may be served on him as such; and if he does not resist, it seems that the lessor may treat it as a vacant possession. *Doe d. Atkins* v. *Roe*, 2 Chit. 179.

18. A rule was made absolute for judgment against the casual ejector, where a rule *nisi* was served on the servant of the tenant on the premises, which were locked up, and nobody there except the servant, who had the keys; the declaration having been served on the servant under nearly the same circumstances. *Doe d. Akins* v. *Roe*, 2 Chit. 184.

19. Service of the declaration on a brother of the tenant in possession is bad, for want of an acknowledgment by the tenant that he had received it. *Right d. Freeman* v. *Roe*, 2 Chit. 180.

20. The Court granted a rule *nisi* to make the service of the declaration on the clerk of a public body (who was directed to be appointed by an Act of Parliament) good service; and the affidavit to ground such a motion must not be entitled in the real names of the defendants. *Anonymous*, 2 Chit. 181.

21. So, such rule was granted against the casual ejector, where the service of the declaration was made on an attorney, who represented himself to be the agent for the tenants in possession, and consented to appear for them. *Anonymous*, 2 Chit. 181.

22. Judgment may be entered up against the casual ejector, where the service of the declaration was made on a person who had the care of the tenant in possession (a lunatic), and the management of his affairs, though not appointed by a regular committee; and the rule *nisi* in such a case should be generally to shew cause, without being directed to any party in particular. *Doe d. Aylesbury (Lord)* v. *Roe*, 2 Chit. 183.

23. The Court granted a rule *nisi*, which was afterwards made absolute, for judgment against the casual ejector, where the house was shut up, and no tenant was in possession, and the declaration was affixed on the most conspicuous part of the premises. *Doe d. Hill* v. *Roe*, 2 Chit. 178.

24. Service of the declaration upon the tenant in possession, must be before the essoign-day of the Term: but where the service was before that day, and the

explanation of it to the tenant in possession did not take place till after:—Held, that the lessor of the plaintiff was not entitled to judgment. *Doe* v. *Roe*, 1 Dow. & Ryl. 563.

25. But an acknowledgment by the defendant of the receipt of the declaration, is not sufficient to entitle the plaintiff to judgment against the casual ejector, unless it be sworn that the admission was before the essoign-day. *Doe d. Tindale* v. *Roe*, 2 Chit. 180.

26. An affidavit to ground a motion that the service of the declaration should not be deemed sufficient, stating that the tenant kept out of the way, is insufficient, unless it states that the person who served the declaration searched for the defendant, and could not find him, or did not know where he was to be found. *Anonymous*, 2 Chit. 177.

27. And it should also state the belief of the deponent, that he kept out of the way to avoid being served. *Doe d. Batson* v. *Roe*, 2 Chit. 176.

28. And where there was no person in the house, the affidavit must state that the party has absconded with a view to avoid the service; or, at least, must swear to his belief of it. *Doe d. Lowe* v. *Roe*, 2 Chit. 177.

29. A rule for judgment against the casual ejector, was made absolute on an affidavit which stated that the service of the declaration had been made on a person believed to have been left in possession by the tenant, who was out of the way, and also on his attorney; and that a letter was sent by the twopenny-post, according to the attorney's direction, to the tenant's last place of abode. *Anonymous*, 2 Chit. 179.

30. And a rule *nisi* was granted, where it appeared from circumstances that the parties understood the contents of the declaration, though the affidavit did not state that it was explained to them. *Anonymous*, 2 Chit. 184.

31. So, where the declaration was put through an iron grating to the defendant, who was in Newgate. *Wright d. Bayley* v. *Wrong*, 2 Chit. 185.

32. So, where the declaration was put on a table before the defendant, but could not be delivered to him, as the defendant's son prevented the person from serving it. *Anonymous*, 2 Chit. 185.

33. So, where the declaration was not read over or explained to the tenant in possession on whom it was served, but who subsequently acknowledged that he had received it, and knew what it was. *Doe d. Thompson* v. *Roe*, 2 Chit. 186.

34. But the Court will only grant a rule *nisi* for judgment against the casual ejector, where the motion is grounded on an affidavit of the defendant's acknowledgment, that he had endeavoured to avoid the service of the declaration. *Anonymous*, 2 Chit. 186.

35. So, where the defendant's attorney has acknowledged the receipt of the declaration from his client. *Anonymous*, 2 Chit. 187.

36. A rule *nisi* can only be obtained in the first instance for judgment against the casual ejector, where the affidavit does not state that the import of the declaration was explained to the servant to whom it was delivered. *Anonymous*, 2 Chit. 182.

37. Service of the declaration on a servant of the tenant in possession, the latter having afterwards acknowledged the receipt of it, is sufficient; but the affidavit to ground the motion for judgment, should state when such acknowledgment was made. *Anonymous*, 2 Chit. 187.

38. In an affidavit on which to move for judgment against the casual ejector, in the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it is necessary to state that such lessee was tenant in possession at the time of such service. *Doe d. Seabrook* v. *Roe*, 4 Moore 350.

39. And if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient for an affidavit to ground a motion for judgment against the casual ejector, to state that a copy of the declaration was served on the tenant who occupied the one part, and that another copy was affixed on the door of that part which was vacant. *Doe d. Evans* v. *Roe*, 4 Moore 469.

40. Proof of the service of the declaration on the tenant in possession is sufficient, without producing the landlord's rule to shew that the defendant comes in as landlord. *Doe d. Giles* v. *Warwick*, 5 M. & S. 373.

41. If a person be named in the declaration as one of the lessors of the plaintiff, without his authority, the party served with the declaration may, before appearance, move the Court to have

such party's name struck out of the declaration. *Doe d. Shepherd* v. *Roe*, 2 Chit. 171.

And see *Doe d. Hammck* v. *Fillis*, 2 Chit. 170. Post. next page.

IV. APPEARANCE.

See also Div. VII. Post.

1. In the *Exchequer*, country ejectments moved for in Terms not issuable, the defendant is entitled to four days' time after the next issuable Term, to appear. *Reg. Gen.* H. T. 39 *Geo.* 3. 2 Chit. 376. 8 Price 504.

2. But now in all country ejectments which shall be served before the essoign-day, either of *Michaelmas* or *Easter* Term, the time for the appearance of the tenant in possession must be within four days after the end of such *Michaelmas* or *Easter* Term, and must not be postponed till the fourth day after the end of *Hilary* or *Trinity* Terms next respectively following. *Reg. Gen.* E. T. 2 *Geo.* 4, 5 Moore 687.
In the *Exchequer*, 9 Price 299.

3. The lessor of the plaintiff, who claims as heir-at-law, cannot compel a person to appear and plead to issue in an action of ejectment, without serving him with a copy of a declaration, although the premises were unoccupied, and a copy had been affixed on the outer door thereof. *Doe d. Younghusband* v. *Roe*, 6 Moore 480.

V. NOTICE TO APPEAR.

And see Post. Div. VII.

1. The notice at the foot of the declaration in ejectment, served in pursuance of the statute 1 *Geo.* 4, c. 87, must be signed by the landlord himself, and not by *Richard Roe*, in order to give the landlord the benefit of that statute. *Anonymous*, 1 Dow. & Ryl. 435. *n.*

2. But such notice need not be in the name of the plaintiff: but, if in the name of the lessor of the plaintiff, or even if it be signed by a wrong name, the Court will permit judgment against the casual ejector to be entered up. *Goodtitle d. Norfolk (Duke)* v. *Notitle*, 5 B. & A. 849.

3. Where several tenants had been duly served with a copy of the declaration in ejectment, judgment may be entered against the casual ejector, although the notice at the foot of the declaration was not addressed to any of either of such tenants. *Doe d. Pearson* v. *Roe*, 5 Moore 73.

4. Judgment was granted against the casual ejector where the declaration was by original, and the notice to appear at the foot thereof was as by bill, omitting "wheresoever, &c."—and it was held immaterial. *Doe d. Thomas* v. *Roe* 2 Chit. 171.

5. The Court granted a rule *nisi* for judgment against the casual ejector where the notice was in the wrong Term, but the tenant in possession was afterwards informed of the mistake. *Anonymous*, 2 Chit. 171.

6. A declaration entitled of *M. T.* 54 *Geo.* 3, instead of 55 *Geo.* 3; but the notice to appear was dated on the 11th *January*, 1815, requiring the tenant to appear "in next *Hilary* Term,"—was held to be sufficient. *Goodtitle d. Ranger* v. *Roe*, 2 Chit. 172.

7. The Court granted a rule for judgment against the casual ejector where the notice to appear was in "*Trinity* Term next," instead of "*Hilary* Term next." *Doe* v. *Greaves*, 2 Chit. 172.

8. If the title to a declaration is wrong, and the notice to appear thereto is correct, the defect in the title is cured. *Anonymous*, 2 Chit. 173.

VI. CONSENT RULE.

1. In every action of ejectment, the defendant must in future specify in the consent rule, for what premises he intends to defend; and must consent in such rule to confess upon the trial that the defendant, (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed. *Reg. Gen.* C.P. H.T. 1821, 5 Moore 310.
Same Rule, 2 Brod. & Bing. 470.
K. B. 2 Chit. 375-379.
Exchequer, 9 Price 299.

VII. PROCEEDINGS TO JUDGMENT, WHERE REGULAR.

1. The plaintiff, in an ejectment on a vacant possession, should proceed more regularly than in a contested possession; and if in such a case, having obtained judgment, he should neglect to take away the rule before the expiration of two days after the Term in which the rule was obtained, the Court will not assist him in the next Term. *Anonymous*, 2 Chit. 188.

2. In country causes, though the declaration has been served before *Michaelmas* Term, the Court will permit the plaintiff in *Hilary* Term to have judgment against the casual ejector. *Doe d. Stott* v. *Roe*, 2 Chit. 189.

3. So, though notice to appear was given in *Easter* Term, a rule absolute in the first instance for judgment against the casual ejector may be moved in *Trinity* Term. *Anonymous*, 2 Chit. 189.

4. But it is too late to move for judgment against the casual ejector in *Trinity* Term, when the notice to appear was in the preceding *Michaelmas* Term. *Anonymous*, 2 Chit. 190.

5. Where the plaintiff was nonsuited, the defendant not having appeared to confess lease, entry, and ouster;—judgment may be signed on the first day of the ensuing Term, and a writ of possession issued on the same day, although the *postea* be delivered over at the time by the associate to the attorney for the plaintiff. *Doe d. Davies* v. *Roe*, 1 B. & C. 118.
S. C. 2 Dow. & Ryl. 229.

VIII. SETTING ASIDE AND STAYING PROCEEDINGS.

See *Doe d. Sutton* v. *Ridgway*, 5 B. & A. 523. Ante. page 90.
Doe d. Irwin v. *Roe*, 1 Dow. & Ryl. 562. Ante, page 115.

1. Where the plaintiff obtained a verdict in ejectment, on a count on a supposed demise by a party, without his authority, and without his concurring in the action;—the Court set aside the verdict. *Doe d. Hammck* v. *Fillis*, 2 Chit. 170.

And see *Doe d. Shepherd* v. *Roe*, 2 Chit. 171. Ante. last page.

2. The plaintiff is not entitled to sign judgment against the casual ejector until after the *postea* is brought in on the day in *banc*: but where, after verdict, by default of the defendant, the plaintiff sued out a writ of possession on the 6th *November*, without producing the *postea*, and executed it on the 12th, without any objection on the part of the defendant until afterwards;—the Court refused to set aside the writ, it appearing that the defendant had sustained no prejudice; and said that if he had, it was matter of reference to the Master. *Doe d. Davis* v. *Williams*, 2 Dow. & Ryl. 229.
S. C. nomine Doe d. Davis v. *Roe*, 1 B. & C. 118.

IX. PLEADINGS.

1. The statute 59 *Geo.* 3, c. 12, s. 17, empowers churchwardens and overseers to take lands and hereditaments in the nature of a body corporate; and declares, that in all actions brought in respect thereof, it shall be sufficient to name the churchwardens and overseers for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish:—Where a declaration in ejectment by churchwardens and overseers contained two sets of counts, one describing them by their *office* without their *names*, and the other by their *names* without their *office*:—Held, that the objection, if any, was cured after verdict. *Doe d. Orleton* (*Churchwardens*) v. *Harpur*, 2 Dow. & Ryl. 708.

EMBEZZLEMENT.—See Post. tit. INDICTMENT.

ENCLOSURE.—See Post. tit. INCLOSURE.

ERROR.

I. WHAT SHALL BE, AND WRIT OF, WHERE SET ASIDE.

1. On a writ of error brought to reverse a judgment of nonsuit in C. P. in an action brought against an infant, it is no ground of error that he had appeared by attorney instead of by guardian. *Bird* v. *Pegg*, 5 B. & A. 418.

2. On error assigned of a misnomer of the Christian name of one of the plaintiffs below, in the warrants of attorney:—Held to be immaterial. *De Tastet* v. *Rucker*, 6 Moore 135.

3. Where the defendant executed a warrant of attorney to enter up judgment, with the usual release of errors and defeasance, and signed a written undertaking therein, that no writ of error should be brought, and the plaintiff revived the judgment by *scire facias*, to which the defendant pleaded, and the plaintiff had judgment, on which the defendant brought a writ of error; the Court of C. P. set it aside on motion, although the defendant contended that it was a release of error, and ought to have been pleaded; and that it did not apply to the judgment on the *scire facias*. *Buddely* v. *Shafto*, 8 Taunt. 434.

II. HOW FAR A SUPERSEDEAS OF EXECUTION.

1. The allowance of a writ of error does not stay execution, unless the defendant perfects his bail in time. *Smith* v. *Howard*, 2 Dow. & Ryl. 85.

2. Therefore, a writ of error is no *supersedeas* of execution, unless bail in error be put in, and notice thereof given within the time limited by the rules of Court. *Attenbury* v. *Smith*, 2 Dow. & Ryl. 85. *n.*

3. Nor will it operate to stay proceedings, unless the party bringing it positively states in his affidavit that there is error. *Mee* v. *Hopkins*, 2 Dow. & Ryl. 208.

4. Where hired bail, who were insolvent, of whom notice had been given, and to whom no exception was entered, became bail in error; and the plaintiff, treating the writ of error and the bail as nullities, entered up judgment and took out execution:—Held, that the execution was regular; and the Court discharged the rule for setting it aside with costs. *Ward* v. *Levi*, 2 Dow. & Ryl. 421. *S. C.* 1 B. & C. 268.

And see *Crum* v. *Kitchen*, 1 B. & C. 269. *n.*

5. The Court will not allow a party to enter up judgment, notwithstanding a writ of error, unless it is expressly shewn that it was brought for delay. Therefore, a declaration by the plaintiff in error, "that he would plague the plaintiff in the original action as much as possible," is not sufficient, because it may be by other means than by writ of error. *Pridham* v. *Budget*, 2 Chit. 191.

6. And if a party declares that he will delay a cause, and states the means by which he will do so, *viz.* by a writ of error, the Court will compel him to shew good cause of error. *Anonymous*, 2 Chit. 191.

7. The defendant having suffered judgment by default, in an action brought against him on bills of exchange, sued out a writ of error, after a notice to compute principal and interest:—Held, that the plaintiff could not take out execution, without some express declaration, either by the defendant or his attorney, that the writ of error was brought for delay, although the defendant had acknowledged the debt to be due before and after the commencement of the action. *Hamilton* v. *Schofield*, 6 Moore 45.

8. Where the defendant's attorney, on the taxation of costs, said that there was error on the record, *viz.* a variance between the affidavit to hold to bail and the declaration; and he had previously said that the plaintiff would never re-

cover the fruits of his judgment, as the defendant was not in a situation to pay, he never having paid such attorney a shilling on account of costs:—the plaintiff having been served with the allowance of a writ of error, and the defendant not having disclosed any other ground of error by his affidavit, the Court refused to set aside an execution issued after the allowance of the writ of error. *Eicke* v. *Sowerby*,
1 B. & C. 287.

9. An admission by an attorney's clerk that a writ of error has been brought for delay, is not sufficient to prevent the writ from operating as a *supersedeas*. *Bygrove* v. *Bolland*,
2 Chit. 193.

III. BAIL IN.

See Ante, tit. BAIL. I. (c) 3. page 42.

1. Bail in error must justify in double the sum for which judgment was entered up. *Phillipson* v. *Browne*, 2 Chit. 105.

2. Although it is a general rule not to grant time for adding and justifying bail in error, in lieu of those of whom notice of justification has already been given, yet, if the bail are prevented from coming up by any misconduct of the opposite party, time will be given to put in other bail. *Dyott* v. *Dunn*,
1 Dow. & Ryl. 9.

3. Though a writ of error has been allowed, yet, if bail in error be not afterwards put in, it will be of no avail, though the defendant in error has treated the writ as a nullity. ———— v. *Nicholls* (*Gent.*), 2 Chit. 106.

4. In an action of debt, upon a judgment recovered (by verdict) in *Ireland*, it is not necessary for the defendant, (having suffered judgment by default, and brought a writ of error,) to put in bail in error. *Parkins* v. *Stewart* (*in error*), 9 Price 1.

5. Where sham or hired bail, who were insolvent and of whom notice had been given, and to whom no exception was entered, became bail in error; the plaintiff may treat the writ of error and the bail as nullities, and take out execution. *Ward* v. *Levi*, 2 Dow. & Ryl. 421.

6. Where a plaintiff in error was also the plaintiff below:—Held, that he was not required to give bail in error; and that the case was not within the statute 3 *Jac.* 1, c. 8; and having given bail by mistake, they were exonerated. *Freeman* v. *Garden*, 1 Dow. & Ryl. 184.

7. Where an indemnity bond was given, conditioned to save the plaintiff harmless from the payment of an annuity, "*and* from all actions, suits, *damages*, and costs which should be brought against him, or that he might sustain by reason of the non-payment of the annuity:"—Held, that this was not a money bond for payment of money only, within 3 *Jac.* 1, c. 8, requiring bail upon a writ of error brought to reverse a judgment in an action upon the bond. *Flanagan* v. *Watkins*,
2 Dow. & Ryl. 549.
S. C. 1 B. & C. 316.

IV. PROCEEDINGS.

(*a*) *When and how stayed pending Writ of Error.*

1. A motion cannot be made to stay proceedings in an action on a judgment pending a writ of error, until bail have been duly put in and perfected. *Abraham* v. *Pugh*, 5 B. & A. 903.

(*b*) *Irregularity in what shall be, and how remedied.*

1. *Sunday* is not one of the four days in the rule to appear to the writ of *scire facias quare executionem non*, although it be not the last. *Goodwin* v. *Sugar*,
2 Chit. 192.

2. A *scire facias quare executionem non* may be tested before the return of the writ of error. *Breach* v. *Dickson*,
2 Chit. 193.

3. An irregularity in issuing an execution for damages and costs in an original action, omitting costs in error, cannot be objected to. *Anonymous*,
2 Chit. 240.

4. Where a party tendered a bill of exceptions at the trial, and brought a writ of error before the Judge had signed such bill:—Held, that he thereby waived the exceptions, and could not afterwards be permitted to append them to the writ of error. *Dillon* v. *Parker*,
1 Bing. 17.

V. JUDGMENTS IN.

See *Dunn* v. *Crump*, 3 Brod. & Bing. 309. Ante, tit. DAMAGES. 2. page 96.

1. The rule for judgment for the plaintiff on a writ of error from an inferior Court, where a verdict and judgment

had been obtained by the defendant in error; and that it might be referred to the Master to tax his costs upon the judgment; the defendant not having joined in error, in conformity to the usual side-bar rule to assign errors,—is not absolute in the first instance; and the Court granted a rule *nisi*. *Swift* v. *Bottom*, 1 Dow. & Ryl. 183.

ESCAPE.

I. LIABILITY OF SHERIFFS AND OTHER OFFICERS.

1. The *Marshal* of the *King's Bench Prison* is not liable to an action of escape for obeying the warrant of Commissioners of bankrupt, in bringing before them a bankrupt confined in his custody charged in execution, in order to be examined on the second day of the meeting of the Commissioners, though it is not the *last day* of examination. *Spence* v. *Jones*, 1 Dow. & Ryl. 377. *S. C.* 5 B. & A. 705.

2. In C. P. a bill may be filed against the *Warden* of the *Fleet* for an escape on the day after the essoign-day, entitled as of the Term generally; and if the plaintiff give a rule to plead on the first day the Court sits, he will comply with the requisition of the statute 8 & 9 *Will.* 3, c. 27, s. 12, provided he do not sign judgment within eleven days after the filing of the bill. *Bolton* v. *Eyles*, 4 Moore 425.

II. EVIDENCE.

1. Where, in action for an escape against the sheriff, the writ in the former action was produced to connect him with his officer, on which was indorsed "warrant to *B.*," who, on being called, stated that he had delivered the warrant to another who did not produce it:—Held, that it should have been left to the Jury to say whether *B.* acted under the sheriff's authority, the indorsement being *primâ fac* evidence that he did so act. *Fermor* v. *Phillips*, 5 Moore 184. *n.* *S. C.* 3 Brod. & Bing. 27. *n.* See *Bowden* v. *Waithman*, 5 Moore 183, *Francis* v. *Neave*, 6 Moore 120, *S. C.* 3 Brod. & Bing. 26, Post. tit. EVIDENCE. II. (*a*) 9. 10. page 124.

III. VERDICT AND DAMAGES.

1. In an action of debt for an escape of a person in execution, the Jury must give a verdict for the whole debt. *Robertson* v. *Taylor*, 2 Chit. 454.

ESCROW.

1. It seems that it is not necessary to shew that the intention that an instrument should operate as an *escrow*, should be clearly expressed at the time of execution: at all events, it is a question for the Jury to determine. *Murray* v. *Stair (Earl)*, 2 B. & C. 82.

ESSOIGN.

1. The interval between the essoign-day, and the first day of the actual sitting of the Court of C. P. must be taken as part of the Term. *Bolton* v. *Eyles*, 4 Moore 425.

ESTOPPEL.

See Post. tit. Release.

1. A defendant having executed a bond describing himself as "*T. B.* of *C.*, in the county of *N.* Esq.:"—Held, on judgment of outlawry and error assigned thereon, that by his own description of himself in the bond, he was estopped from saying that he was not properly described in the writ, "of a town, hamlet, or place," within the words of the statute of additions, 1 *Hen.* 5, c. 5. *Bonner* v. *Wilkinson*, 1 Dow. & Ryl. 328. *S. C.* 5 B. & A. 682.

ESTREAT.

1. Where the defendant, on being taken into custody on the 8th *June*, under a Judge's warrant issued against him on an indictment for a blasphemous libel, entered into a recognizance to appear and plead, within the first eight days of the ensuing *Trinity* Term, and to try the cause at the *Middlesex* Sittings after that Term, and pleaded not guilty, but did not give notices of trial or make up the record, either for the Sittings after *Trinity* or *Michaelmas* Term, nor was any rule obtained for respiting the estreating of the recognizances; and the prosecutors gave notice of trial after *Trinity* and *Michaelmas* Terms, but the causes were not tried in either; but made *remanents* to the Sittings after *Hilary*, and the defendant was ready to take his trial on both these occasions; and the recognizances were estreated in *Hilary* Term, without any notice having been given to the defendant, or any motion made by the prosecutors:—Held, that the estreat was regular, and conformable to the ordinary practice. *Rex* v. *Clark*, 5 B. & A. 728.

EVIDENCE.

I. State Papers.

(a) Where Evidence.

See also Div. IV. (a) 2. Post. page 125.

1. The *Gazette* is sufficient evidence of a proclamation issued under an order in council;—because such proclamation is a public act, regarding the Crown and Government, and must pass the Great Seal before it can be admitted into the *Gazette*. *Attorney General* v. *Theakstone*, 8 Price 89.

II. JUDICIAL AND LEGAL PROCEEDINGS.

(*a*) *When admissible.*

1. A printed copy of the "*Cinq Codes*" of *France*, produced by the French Vice-Consul resident in *London*, who purchased it at a bookseller's shop at *Paris*, was received as evidence of the law of *France*, upon which the Court would act. *Lacon* v. *Higgins*, 1 Dow. & Ryl. N.P.C. 38.

2. The notarial certificate and seal verified by the *British* Consul, whose hand-writing is sworn to, of the execution of a power of attorney, executed in *America* to a person in *London*, to receive money here for the party abroad; is not evidence in a Court of law of the due execution of the instrument, without the affidavit of the subscribing witness. *Ex parte Church*, 1 Dow. & Ryl. 324.

3. On motion to postpone a trial, upon an affidavit suggesting the absence of the copy of a judicial document in the *West Indies*, which was material and necessary on the trial of the cause: the Court would not try the admissibility of the evidence, where it was objected that when such document arrived it could not be admitted; but postponed the trial until it should arrive. *Mackenzie* v. *Hudson*, 1 Dow. & Ryl. 159.

4. In an action against three defendants, as partners, the office copy of an answer to a bill in *Chancery*, filed by one against the others, is admissible evidence, without producing the original, in order to establish the partnership;—and to prove the identity of the defendants, the clerk of their solicitor is a competent witness to that fact, though he knows nothing of the defendants but from his intercourse with them professionally in conducting the suit in *Chancery*. *Studdy* v. *Sanders*, 2 Dow. & Ryl. 347.

5. Where the commander-in-chief directed a military inquiry to be held to investigate the conduct of a commissioned officer in the army, who afterwards sued the President of such Court of Inquiry for a libel stated to be contained in his report and transmitted by him to the commander-in-chief:—Held, that such report was a privileged communication, and properly rejected as evidence at the trial; and that an office copy thereof was also inadmissible. *Home* v. *Bentinck, (Lord)* 4 Moore 563.

6. In an action on an indemnity bond, the *postea* was held sufficient evidence in proof of an allegation in a replication, that the plaintiff was obliged to and did pay a sum of money, *as and for the damages and costs recovered* by the person against whose claims the obligor had become bound to protect the plaintiff; where, in consequence of an arrangement between the parties, no judgment was ever entered up. *Harrop* v. *Bradshaw*, 9 Price 359.

7. It seems that the affirmation of a Quaker cannot be received in evidence to call on an attorney to answer the matters of an affidavit, which might make him liable to an attachment or to be struck off the roll. *In re Gellibrand*, 1 Dow. & Ryl. 121.

8. In an action of trover by the assignee of the sheriff against the assignees of a bankrupt, for taking goods which the assignee of the sheriff claimed under an execution issued before the bankruptcy against the bankrupt's effects:—Held, that the assignee of the sheriff must prove the judgment against the bankrupt, as well as the writ of execution, unless it appears upon the record or Judge's notes, that the defendants were the assignees of the bankrupt. *Glasier* v. *Eve*, 1 Bing. 209.

9. In an action of debt against the sheriff, to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody on giving bail:—Held, that the indorsement of the name of the officer on the writ was sufficient to connect him with the sheriff, without shewing that such indorsement was made with his authority. *Bowden* v. *Waithman*, 5 Moore 183.

And see *Fermor* v. *Phillips*, *Id.* 184. (*n*). Ante. tit. ESCAPE. II. 1. page 122.

10. So, in an action against the sheriff for not arresting a defendant, proof of the indorsement of the officer's name on the writ by a clerk in the under-sheriff's office, is sufficient to connect such officer with the sheriff, and shew that the indorsement was made with his authority, without calling the officer himself, or producing the warrant under which he acted. *Francis* v. *Neave*, 6 Moore 120. *S. C.* 3 Brod. & Bing. 126.

III. PUBLIC INSTRUMENTS.

(*a*) *When and how far admissible.*

1. In debt on bond against the surety of a deceased collector of taxes, condi-

tioned for the due performance of his duty as such, and for delivering to the obligee all books and accounts entrusted to his care; a collecting-book received by him from his predecessor, for the faithful delivery of which to the obligee the defendant became surety; and on the death of the principal it was accordingly delivered to such obligee, containing the names of the parishioners residing within the parish for which the collector was appointed, and the sums at which they were rated; and the usual mark was made by him therein, opposite to some of such names, by which he indicated the receipt of the sums assessed on such parishioners:—Held by the Court of C. P. that the entries made in such book were properly received in evidence at the trial, as it might be deemed a public book. *Goss* v. *Watlington,* 6 Moore 355.
S. C. 3 Brod. & Bing. 132.

2. The certificate of an agent for *Lloyd's* at a foreign port, ascertaining an average loss upon a cargo damaged by sea-water, is not of itself admissible evidence to shew the amount of the loss, in an action brought by the assured against the underwriter in this country. *Drake* v. *Marryat,* 2 Dow. & Ryl. 696.
S. C. 1 B. & C. 473.

IV. PRIVATE WRITINGS.

(*a*) *Where Evidence, and herein of the proof and execution of Deeds.*

See also Post. tit. INSPECTION OF DEEDS.

1. A stamped agreement for a lease of premises for seventeen years and a half, to which the plaintiff was no party, but made between the defendant and other persons, from whom the plaintiff derived title to the premises, is admissible in evidence to prove the defendant's promise to keep the messuages in repair. *Dyer* v. *Ashton,* 2 Dow. & Ryl. 119.
S. C. (not *S. P.*) 1 B. & C. 3.

2. Communications in official correspondence relating to matters of state, cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in the exercise of the power given to him as such officer;—not only because such communications are confidential, but because their disclosure might betray secrets of state policy, which might be injurious to the interests of the country:—Nor can an extract be admitted relating to the particular matter, because the whole must be read, or none. *Anderson* v. *Hamilton,* 8 Price 244. (*n.*)
S. C. 4 Moore 593. (*n.*)
2 Brod. & Bing. 156. (*n.*)

3. The date of a letter is evidence against the writer that it was written where dated. *Anonymous,* 2 Chit. 194.

4. Letters of a party under whom the plaintiff does not claim, are inadmissible in evidence to affect the title of the latter. *Halford* v. *Dillon.* 4 Moore 381.

5. Where lands were granted in the occupation of a particular person who had died two years before the deed was executed:—Held, that for the purpose of explaining a latent ambiguity in the grant, letters written by a third person to the grantees respecting the sale to them by the grantor, and purporting to be written by his direction, were admissible in evidence, without shewing an express authority from the grantor to write them. *Beaumont* v. *Field,* 2 Chit. 275.
S. C. (better reported) 1 B. & A. 247.

6. The copy of an original letter, containing notice of the dishonour of a bill of exchange, may be given in evidence without notice to produce the original letter. *Kine* v. *Beaumont,* 3 Brod. & Bing. 288.

7. In debt on bond against the surety of a deceased collector of taxes, conditioned for the due performance of his duty as such, and for delivering to the obligee all books and accounts entrusted to his care; a collecting-book received by him from his predecessor, for the faithful delivery of which to the obligee the defendant became surety; and on the death of the principal it was accordingly delivered to such obligee, containing the names of the parishioners residing within the parish for which the collector was appointed, and the sums at which they were rated; and the usual mark was made by him therein, opposite to some of such names, by which he indicated the receipt of the sums assessed on them; and receipts signed by him for money paid to him in his official capacity, were produced and received in evidence against the surety, on the execution of a writ of inquiry:—Held in C. P., on a motion whether such receipts

ought to have been admitted, that the circumstances of the case did not warrant either an actual or implicit authority by the surety, to admit the receipts of the principal as evidence against him. *Goss* v. *Watlington*, 6 Moore 355. *S. C.* 3 Brod. & Bing. 132.

8. Two unstamped slips of paper, with "*I. O. U.* 400*l.*," and "*I. O. U.* 250*l.*" written thereon, are neither promissory notes nor receipts, and therefore may be received in evidence in *assumpsit* for money lent. *Childers* v. *Boulnois*, 1 Dow. & Ryl. N.P.C. 8.

9. Where *assumpsit* was brought for money lent in *France*, and unstamped receipts were produced in proof of the loan;—Held, that evidence could not be admitted to shew that by the law of that country such receipts required stamps to render them valid. *James* v. *Catherwood*, 3 Dow. & Ryl. 190.

10. Where an assignment by deed of a lease of premises taken in execution, was made in the name and executed under the seal of office of the sheriff, by his under-sheriff:—Held, that such assignment might be proved without shewing the appointment of the under-sheriff, or that he had power by deed to execute instruments in the name of the sheriff. *Doe d. James* v. *Brawn*, 5 B. & A. 243.

11. In an action for the use and occupation of premises against the assignees of a bankrupt:—Held, that the deed of assignment of the bankrupt's effects, produced by the defendants at the trial under a notice from the plaintiff so to do, was admissible in evidence, without proof of the execution by the subscribing witness, as it appeared that two of the assignees had continued to occupy the premises after the act of bankruptcy, and thereby claimed a beneficial interest under the deed. *Orr* v. *Morice*, 6 Moore 347. *S. C.* 3 Brod. & Bing. 139.

12. If, upon a fair and diligent enquiry, an attesting witness to a deed cannot be found, evidence of his handwriting is admissible;—and in accounting for his absence, or the loss of a written instrument, general answers to enquiries, that nothing is known concerning them, are admissible in evidence; but declarations as to particular facts are not, if the party making them is capable of being called as a witness. *Doe d. Johnson* v. *Johnson*, 2 Chit. 196.

13. Where, in an action of debt on bond, it was sworn that the deponents had learned that the attesting witness kept out of the way to avoid an arrest:—Held, that this was not a sufficient reason for dispensing with the attendance of such subscribing witness to prove the execution of the bond by the obligor; and evidence of his hand-writing having been given *aliundè*, on which the obligee obtained a verdict, the Court of C. P. ordered a new trial. *Lytt* v. *Griffith*, 6 Moore 538.

(*b*) *Hand-writing.*

See *Taylor* v. *Cook*, 8 Price 653.

1. Where a feigned issue was directed by the Court to try a question as to the forgery of a signature to a warrant of attorney; and a verdict was found, establishing the genuineness of it upon evidence satisfactory to the Judge who tried the cause; and in the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, that from his knowledge of hand-writing in general, the signature in question was not genuine, but an imitation;—this evidence having been rejected, the Court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight; and that the issue being to satisfy the Court, a new trial ought not to be granted, unless for a rejection of evidence which might reasonably have altered the verdict. *Quære*—Whether such evidence be, in point of strictness, admissible at all? *Gurney* v. *Langlands*, 5 B. & A. 330.

2. Where a witness prevaricated in his evidence as to the hand-writing of the defendant, as indorser of a bill of exchange; and swore both negatively and affirmatively as to his belief upon the subject; and there was no other evidence of the hand-writing;—the Judge refused to stop the cause, leaving it to the Jury to decide what credit was due to the witness. *Beauchamp* v. *Cash*, 1 Dow. & Ryl. N.P.C. 3.

V. HEARSAY AND REPUTATION.

(*a*) *In what Cases admissible.*

And see Divs. VII. IX. Post. page 128.

1. The statute 16 & 17 *Car.* 2, c. 12, for making certain rivers navigable,

gave the undertakers therein mentioned, power to make new cuts, &c. for the purpose of improving the navigation of such rivers; but required them to make compensation to the owners of lands through which such cuts, &c. were to be carried, for any injury done to their property, according to the determination of Commissioners, or in pursuance of agreement between the parties; but the act contained no clause giving the undertakers any power to *purchase lands;* nor did it recognize in them any right of soil in the beds or banks of the rivers intended to be made navigable.—Where therefore, a certain river mentioned in the act, was made navigable by certain undertakers in 1702, and their successors exercised for a long series of years acts of ownership and enjoyment of the banks, by cutting bushes, &c.; and had granted a lease of hatches and sluices made in one of the banks to an occupier of land adjoining thereto, for the purpose of irrigation, and there was no proof of any agreement between the undertakers and the original proprietors of the land, for the purchase of the soil of the bank:—Held, that evidence of acts of ownership and enjoyment exercised by the undertakers on other parts of the line of the navigation, was inadmissible to shew their title to the *locus in quo,* unless unity of title and character, between the *locus in quo* and the other parts of the line of navigation was previously established. *Hollis* v. *Goldfinch,* 2 Dow. & Ryl. 316. *S. C.* 1 B. & C. 205.

2. Evidence of reputation is admissible on a question as to private rights, *viz.* whether a place is or is not parcel of a sheep walk. *Davies* v. *Lewis,* 2 Chit. 535.

VI. PAROL.

(*a*) *To explain written Instruments.*

See *Beaumont* v. *Field,* 2 Chit. 275. Ante, page 125.

1. Where a bill was filed as of *Michaelmas* Term generally, with a special memorandum that it was filed on the last day of that Term; and it appeared that the demand and refusal were on the day after the Term:—Held, that in order to sustain the action, parol evidence was admissible to shew that the bill was not actually filed until the 24th *December.* *Wilson* v. *Girdlestone,* 1 Dow. & Ryl. 488. *S. C.* 5 B. & A. 847.

2. By a memorandum of adjustment indorsed on the back of a policy, it was stated that a particular average loss of 54*l. per cent.* had been settled between the plaintiff (an underwriter) and the defendant:—Held, that parol evidence was admissible to shew, that by a previous arrangement, it was agreed that if the other underwriters paid a less sum, the surplus should be repaid. *Russell* v. *Dunskey,* 6 Moore 233.

3. *A.* by deeds of assignment, and bargain and sale, assigned and sold respectively an unexpired lease of premises, and the fee simple of a messuage, &c. to *B.*; and in each instrument recited that he had received the purchase-money, and on the back of each, wrote a receipt for the purchase-money in full: after which, a memorandum of agreement, not signed or stamped, was drawn up between the parties, reciting that *B.* had lately purchased of *A.* the premises in question; and that *A.* being indebted to *B.* in the sum of 100*l.*, had agreed that the same should be considered as in part payment of the said purchase-money; but it being understood, that in case the dividend about to be paid by *A.* to his creditors should not amount to twenty shillings in the pound, then that *A.* was to do work for *B.* in his line of a builder, to the amount of such deficiency; and further, that *B.* was to retain in his hands the sum of 60*l.* to be also considered as in part payment of the said purchase-money; and for which said sum *B.* was to do and perform work for *A.* in his line of a plumber and glazier. — *Indebitatus assumpsit* being brought by *A.* to recover the money actually due to him, as the purchase-money of the premises in question, the declaration alleging that the sum was due for and in respect of divers tenements, &c. sold by the plaintiff to the defendant, and that thereupon, in consideration that the plaintiff would take the work and labour of the defendant as a plumber and glazier, at reasonable prices, to the extent of the said debt, in payment and satisfaction thereof, the defendant undertook to do and perform for the plaintiff all such work and labour as he might require, to the extent of the said debt; averring readiness of the plaintiff to receive the work, and

refusal of the defendant to perform it:—Held, that neither the agreement nor parol evidence of the contents was admissible to shew that the consideration-money had not been paid. *Baker* v. *Dewey*, 3 Dow. & Ryl. 99.
But see *S. C.* 1 B. & C. 704.

VII. DECLARATIONS.

(*a*) *When admissible.*

1. In trover for a deed, which the defendant admitted he detained at the request of *J. S.*, and in the detention of which the latter was substantially interested:—Held, that the declarations of *J. S.* in favour of the plaintiff's claim were properly admitted in evidence; but that he himself could not be examined as a witness. *Harrison* v. *Vallance*, 1 Bing. 45.

2. Declarations made by a widow, in the possession of premises for more than twenty years, that she held them for her life only, and that after her death they would go to the heirs of her husband, are admissible in evidence to negative the fact of her having had twenty years' adverse possession. *Doe d. Human* v. *Pettett*, 5 B. & A. 223.

3. Declarations made by a bankrupt before and after the issuing of a commission against him, are inadmissible in evidence to shew that it was founded in fraud. *Lloyd* v. *Heathcote*, 5 Moore 129.

And see *Thomson* v. *Bridges*, 2 Moore 376.

VIII. ADMISSIONS.

(*a*) *By Parties.*

1. Where a witness was called to prove a conversation with the plaintiff, in which the latter proposed to refer the matters in dispute between him and the defendant to the arbitration of the witness; which being refused, the plaintiff admitted that he had received on account of the defendant a larger sum than his demand in the action:—Held, that the whole of this conversation ought to have been received in evidence, although the plaintiff requested the witness to state the conversation between him and the plaintiff to the defendant, to induce the latter to compromise. *Thomson* v. *Austen*, 2 Dow. & Ryl. 358.

(*b*) *By Agent.*

1. Where an attorney's clerk admitted, on the taxation of costs before the Master, that the cause in which the costs were taxed was conducted by his employer from motives of charity, on behalf of the plaintiff:—Held, that the clerk was such an agent as to bind his master by such admission. *Ashbourne* v. *Price*, 1 Dow. & Ryl. N.P.C. 48.

2. Where letters between parties shewed that an insurance broker had considered himself as dealing with one of the owners of a ship only, and as having insured for him alone; they were held to be conclusive against the broker, as fixing him with an agency for his correspondent solely. *Roberts* v. *Ogilby*, 9 Price 269.

(*c*) *By Wife.*

1. Admissions made by the defendant's wife, who served in her husband's shop, and conducted his business in his absence, may be given in evidence against her husband, on an application to pay for goods before sold, and delivered at the shop. *Clifford* v. *Burton*, 1 Bing. 199.

IX. DEGREE OF EVIDENCE.

(*a*) *Presumptive.*

1. Where the defendant's ancestor came into possession of certain lands seventy years ago, as a creditor under a judgment obtained against the then owner, and the defendant's family had continued in possession ever since:—Held, that the original possession not having been taken under any conveyance, the length of possession was only *primâ facie* evidence, from which a Jury might infer a subsequent conveyance by the original owner, or some of his descendants; but that it might be rebutted by other evidence; and that the Jury were not to presume such conveyance from length of possession, unless they were satisfied that such conveyance had actually been executed. *Doe d. Fenwick* v. *Reed*, 5 B. & A. 232.

2. A grant of wreck from *Henry* 2, to the Abbey of C., by *all their lands upon the sea*, confirmed by *inspeximus* by *Henry* 8; and a subsequent grant by him of the island of *B. and its shores*, belonging to the late Abbey of C., sup-

ported by evidence, that between forty and fifty years ago the proprietor of the island of *B.* raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, without opposition:—Held, that although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public; yet, that it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in those grants, served to establish such right. *Chad* v. *Tilsed*, 5 Moore 185.

3. Where the lessees of a fishery had publicly landed their nets on certain parts of the bank of a river for more than twenty years, and had occasionally sloped and levelled such landing-places; although no evidence was offered at the trial to shew that the owner of the soil, or any person claiming under him, had any knowledge of the lessees' landing their nets:—Held, that as such acts could scarcely have been exercised without such knowledge, it was properly left to the Jury to presume a grant of the right of landing nets to the lessees of the fishery, by some former owner of the soil. *Gray* v. *Bond*, 5 Moore 527.

4. The statute 16 & 17 *Car.* 2, c. 12, for making certain rivers navigable, gave the undertakers therein mentioned, power to make new cuts, &c. for the purpose of improving the navigation of such rivers; but required them to make compensation to the owners of lands through which such cuts, &c. were to be carried, for any injury done to their property according to the determination of Commissioners, or in pursuance of agreement between the parties; but the act contained no clause giving the undertakers any power to *purchase lands;* nor did it recognize in them any right of soil in the beds or banks of the rivers intended to be made navigable. Where a certain river, mentioned in the act, was made navigable by certain undertakers in 1702, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks by cutting bushes, &c.; and had granted a lease of hatches and sluices made in one of the banks to an occupier of land adjoining thereto for the purpose of irrigation, and there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank:—Held, that such an agreement could not be presumed from these acts of ownership and enjoyment, when opposed to similar acts exercised by the occupier of the adjoining land; and that the act of Parliament afforded strong evidence against such presumption. *Hollis* v. *Goldfinch*, 2 Dow. & Ryl. 316. *S. C.* 1 B. & C. 205.

5. Twenty years' regular usage, uncontradicted and unexplained, is cogent evidence for a Jury to presume that a custom for the steward of a manor to *nominate* the Jury to serve on the Court-leet, at the election of the mayor of a borough, is an immemorial custom. *Rex* v. *Jolliffe*, 3 Dow. & Ryl. 240. *S. C.* 2 B. & C. 54.

X. NEGATIVE AVERMENTS.

1. On an agreement to pay 100*l.* if the plaintiff would not send herrings for a twelvemonth to the *London* market, and particularly to the house of *J. S.*; and the plaintiff proved he had sent no herrings during the twelvemonth to that house:—Held sufficient to entitle him to recover, no proof being given by the defendant that the plaintiff had sent herrings within the year to the *London* market. *Calder* v. *Rutherford*, 3 Brod. & Bing. 302.

EXCISE.

MATTERS RELATIVE TO WINE.

See *Sewart* v. *Denton*, 2 Chit. 456. Post. page 134.

1. The regulations of the 27 *Geo.* 3, c. 13, s. 3, do not apply to the temporary allowances on foreign wines granted by the 27 *Geo.* 3, c. 31; and such allowances may be claimed, though the wines were exported more than three years after importation. *Whitmore* v. *Papillon*, 2 Chit. 628.

EXCOMMUNICATION.

1. The statute *53 Geo. 3*, c. 127, substitutes the writ *de contumace capiendo* for the old writ *de excommunicato capiendo*; and directs that the former shall be considered in the same way, and be open to the same objections, as the latter:—Therefore, where a defendant was committed by an Ecclesiastical Judge of appeal for contumacy in not paying costs, and the *significavit* only described the suit to be "*a certain cause of appeal and complaint of nullity*," without shewing that the defendant was committed for a cause within the jurisdiction of the Spiritual Judge:—Held, that the defendant was entitled to be discharged on *habeas corpus*. *Rex* v. *Dugger*,
1 Dow. & Ryl. 460.
S. C. 5 B. & A. 791.

2. But a Spiritual Judge has no jurisdiction over the *trustee* under a testator's will:—Therefore, where a trustee was committed upon a writ *de contumace capiendo* under the above statute, for not exhibiting an inventory and account of the goods of his testator, the Court, on his being brought up by *habeas corpus*, ordered him to be discharged. *Rex* v. *Jenkins*, 3 Dow. & Ryl. 41.

EXECUTION.

I. WRITS OF.

(*a*) *When and how sued out and executed.*

See *Priest* v. *Milnes*, 2 Chit. 114. Ante, page 58.

Post. tit. FRAUDULENT CONVEYANCE.

1. In order to prevent the fraudulent issuing of writs of execution, without judgments to support them;—it was ordered that the sealer of the writs in the Court of *King's Bench* should not seal any writ of *fieri facias*, or *capias ad satisfaciendum*, without having the judgment paper, *postea*, or inquisition, produced to him; and it was further ordered, that the attorney concerned for the plaintiff in the cause, or his agent, should, upon all *bailable mesne process*, and every writ of attachment and *fieri facias*, and *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent might be able to give. *Reg. Gen.* H.T. 2 & 3 *Geo.* 4.
1 Dow. & Ryl. 471.
5 B. & A. 560.
2 Chit. 377.

2. A *fieri facias* and a *capias ad satisfaciendum* may issue at the same time, the one against the goods, and the other against the person of a defendant. *Primrose* v. *Gibson*, 2 Dow. & Ryl. 193.

3. Where a verdict was found for the plaintiff at *Nisi Prius* for the damages laid in the declaration, subject to the award of an arbitrator who declined proceeding in the reference, he having been previously consulted by one of the parties in the cause:—Held, that the plaintiff was entitled to issue judgment and execution against the defendant forthwith for the damages found by the Jury, unless he consented to refer the damages to another arbitrator. *Woolley* v. *Clark*.
2 Dow. & Ryl. 158.
S. C. nomine Woolley v. *Kelly*,
1 B. & C. 68.

II. CAPIAS AD SATISFACIENDUM.

(a) *When and how sued out, and on what grounds quashed.*

1. Where a *fieri facias* was issued, and goods taken under it were sold for a part of the debt, a *capias ad satisfaciendum* for the remainder cannot be issued until the sheriff has finally returned the *fieri facias*. *Wilson* v. *Kingston*,
2 Chit. 203.

2. It seems that a *capias ad satisfaciendum* may be sued out, and the defendant arrested thereon before the return of a writ of *fieri facias* previously executed by entering on the possession of the defendant's goods, as soon as the writ of *fieri facias* is withdrawn, if, during the whole time of such possession by the sheriff, a person is also in possession of the same goods, under a distress for rent. *Edmond* v. *Ross*,
9 Price 5.

3. A plaintiff will not be permitted, on motion in the Court of *Exchequer*, to quash a writ of *capias ad satisfaciendum*, sued out by him and lodged with the sheriff for the purpose of fixing the defendant's bail in the usual course, on the return of *non est inventus*, where the defendant has voluntarily surrendered in discharge of his bail before the return of the *ca. sa.* and afterwards become bankrupt; although the plaintiff undertook to enter an *exoneretur* on the bail-piece, and make an affidavit that it was never intended to take the defendant in execution upon the *ca. sa.* *Stott* v. *Smith*,
8 Price 512.

Quære—How far the practice of making such formal return of *non est inventus* is sustainable; or whether it is not an abuse of process? 8 Price 512.

III. FIERI FACIAS.

(a) *Relation of, and how sued out.*

See also Post. tits. { EXTENT. PRISONER.

1. Where a *fieri facias* is sued out after a *scire facias* on a judgment, although the latter writ is unnecessary, the *fieri facias* must be grounded on the *scire facias*, and cannot be issued in the common form. *Davis* v. *Norton*,
1 Bing. 133.

2. A writ of *fieri facias* having issued against a debtor at the suit of one creditor, and before it was executed the attornies of another creditor having in the mean time obtained a warrant upon another *fieri facias* from the same sheriff, directed to their clerk, and executed it before the prior execution was put in:—Held, that the attornies were liable to the sheriff (who had made a return that he had levied the money under the first writ, and had in fact paid the amount of the debt to the creditor) to refund the money levied under the second execution, in an action for money had and received to his use. *Saule* v. *Paynter*,
1 Dow. & Ryl. 307.

(b) *What may be taken under.*

1. Ranges, ovens, and set pots, affixed to a house built by the person against whom an execution has issued, cannot be taken by the sheriff under a writ of *fieri facias*. *Wynne* v. *Ingleby*,
1 Dow. & Ryl. 247.
S. C. 5 B. & A. 625.

2. Where mill-machinery and a mill were demised to a tenant for a term, and he severed the machinery from the mill without the consent of his landlord, and it was afterwards seized by the sheriff under a *fieri facias* and sold by him:—Held, that no property passed to the buyer under such sale. *Farrant* v. *Thompson*, 5 B. & A. 826.

3. Under an execution by *A.* against *B.*, the Court of C. P. refused to order the sheriff to pay over money in his hands, levied on an execution by *B.* against *C.* *Padfield* v. *Brine*,
3 Brod. & Bing. 294.

(c) *Sheriff's Authority and Duty in executing.*

See *Rex* v. *Carlisle*, 1 Dow. & Ryl. 474.
Post. tit. SHERIFF.

1. Growing crops of a tenant having been seized under a *fieri facias*, a writ of *habere facias possessionem* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the *fieri facias*:—Held, that the sheriff was not bound to sell the growing crops under the *fieri facias*, as they could not be legally considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration of ejectment; and that the sheriff was not bound to allow to the landlord a year's rent under the

8 *Anne*, c. 14, that statute contemplating an existing tenancy at the time of the execution; which, under the circumstances, must be taken to have ceased on the day of the demise in the ejectment. *Hodgson* v. *Gascoigne*, 5 B. & A. 88.

2. Where a sheriff has taken possession of goods and chattels under a *fieri facias*, his officer should continue the possession; or, if he may abandon it even necessarily for a time, he must clearly and satisfactorily account for so doing, in order to sustain his right against others afterwards claiming under legal authority to seize the same goods; and in case of an abandonment on the return-day of the writ, possession cannot afterwards be resumed. *Ackland* v. *Paynter*, 8 Price 95.

3. Where a sheriff had seized goods of a debtor under a *fieri facias* delivered to him by a judgment creditor, and executed a bill of sale of them to the creditor, and given him possession;—a *levari facias* issued by the Crown, on a judgment entered up for penalties incurred by the debtor for frauds on the revenue, under a verdict obtained on an information filed before the subject-creditor's judgment, comes too late; for the property in the goods becomes, by the bill of sale, completely altered;—and in such a case the sheriff might well return *nulla bona*:—If, however, any of the goods included in the bill of sale have been made chargeable with the duties of Excise in arrear, on a breach of the Revenue Laws, on which the information was founded, the Crown will be entitled to a verdict for the value of such goods, notwithstanding the sale; and the return of *nulla bona* will not be a good return as to them. *Attorney-General* v. *Fort*, 8 Price 364. (*a*).

4. In an action against the sheriff for removing goods under an execution, without satisfying the landlord's claim of a year's rent:—Held, that a notice to the sheriff, before the removal, stating that a year's rent was due from the tenant to the mortgagor (naming him), and the mortgagees of his estates, and signed by the receiver of the rents, is sufficient, although such receiver was not appointed by the mortgage-deed; and that it was the duty of the sheriff to levy for the rent in the first instance, and then for the execution; and he must retain a sufficient sum to satisfy such rent, before he remove any of the goods from off the premises. *Colyer* v. *Speer*, 4 Moore 473.

(*d*) *Landlord's Claim for Rent.*

1. In an action against the sheriff for removing goods under an execution without satisfying the landlord's claim of a year's rent:—Held, that a trustee of an outstanding satisfied term, in trust for mortgagees, and to attend the inheritance, must be considered a landlord within the statute 8 *Anne*, c. 14, s. 1, and entitled to maintain such action. *Colyer* v. *Speer*, 4 Moore 473.

IV. SEQUESTRARI FACIAS.

1. Where a bishop granted sequestration against the effects of a clergyman within his diocese, he stands in the same situation as sheriff, and the Court has the same power over him as over that officer. Therefore, where four writs of sequestration had issued against the effects of a clergyman, at the same time and by the same attorney, at the suit of different persons, and they had been placed so as to defeat the execution of the plaintiff, who was entitled to priority; the Court ordered the bishop to return what he had levied, and give precedence to the writ issued at the suit of the plaintiff. *Rex* v. *London* (*Bishop*), 1 Dow. & Ryl. 486.

V. EXECUTION, WHEN SET ASIDE.

1. The Court of *Exchequer* refused to set aside an execution against the goods of a person, who, having been discharged under an Insolvent Debtors' Act, gave a note to his creditor, (the plaintiff,) for the part of the debt which was not paid under the assignment: and held, that where the remedy is taken away and not the debt, the latter might still be the ground of a future promise or security. *Best* v. *Barker*, 8 Price 533.

2. But an execution sued out against the goods of a defendant on a judgment recovered, was set aside, and the money which had been levied under it ordered to be restored: the defendant having been, pending the action, discharged under the Insolvent Debtors' Act, 1 *Geo.* 4, c. 119: and that Court considering the proceeding reprehensible, made the rule absolute with costs. *Darley* v. *Brown*, 8 Price 607.

3. An execution on two writs of *scire facias*, cannot be set aside for irregularity in issuing the *fieri facias* on the first *scire facias* for the damages and costs in the original action, omitting the costs in error. *Anonymous*, 2 Chit. 240.

EXECUTORS AND ADMINISTRATORS.

I. RIGHTS, INTERESTS, AND POWERS OF.

See Post. tit. PROHIBITION.

1. Where *A.* by will directed his real and personal estates to be sold, and the produce to be invested in the funds in the names of trustees to be appointed by his executors, for his son and daughter, and two other females; and that if all the legatees should die under age, and without issue, the property was to go over to *B.*, *C.*, *D.*, and *E.*, and their heirs; and *A.* appointed *B.*, *C.*, *D.*, and *E.* his executors, to see that his will was performed; and he also appointed *F.* and *G.* as executors, "in addition to the above four;" and requested the two latter to act as guardians in conjunction with the other four, for the care of the legatees: and the will was duly attested, but there was an unattested codicil, that if either of the executors should refuse to accept the trust and act as executor, the bequest of property to every such person was altogether annulled; and the testator died, and the will was proved by *B.*, *C.*, and *D.* only; *E.*, *F.*, and *G.* having renounced; and part of the real estate having been put up to sale in four lots and purchased by *G.*, who afterwards declining to complete his purchase, a suit was instituted in *Chancery*; and upon reference to the Master, it was found that the contract of purchase entered into by *G.* was for the benefit of the *cestui que trusts*; and the first lot was conveyed by lease, appointment, and release from *B.*, *C.*, *D.*, *E.*, *F.*, and *G.*, to *T.*, in consideration of 2000*l.*; the second by a like conveyance from *B.*, *C.*, and *D.*, to *T.* for 2300*l.*, (*T.* declaring by another deed, that the consideration-money mentioned in the two first deeds belonged to *G.*, that the name of *T.* was only used as a trustee, and that *T.* stood seised of the premises in trust for *G.*); the third lot was conveyed by a like conveyance from *B.*, *C.*, and *D.*, to *G.*, to the use of *G.*, for 4000*l.*; and the fourth by a similar conveyance from *B.*, *C.*, *D.*, *E.*, *F.*, and *G.*, to *G.*, to the use of *G.*, for 360*l.*:—Held, that by these conveyances the legal estate in the first and second lots was well vested in *T.*; and that in the third and fourth lots, in *G.* *Mackintosh* v. *Barber*, 1 Bing. 50.

2. Where an executor obtained probate of a will, with notice that the testator had made a subsequent will, appointing another executor, and he acted by taking possession of the testator's effects:—Held, that the executor under the second will, who had obtained probate, might maintain trover for the effects so taken possession of. *Woolley* v. *Clarke*, 1 Dow. & Ryl. 409. *S. C.* 5 B. & A. 744.

3. A deed between *A. B.* and the defendant of the one part, and *C. D.* of the other, whereby the two former agreed with the latter, his executors and administrators, to pay him a certain annuity for twenty-one years; or in case of his death within the term, to the use of his child or children, if any; but if not, to his then wife, if she should remain his widow; and *C. D.* died within the term, leaving one daughter, who also died within the term intestate, and his wife died in his lifetime:—Held, that the administrator of the daughter could not maintain an action against the defendant on the deed for non-payment of the annuity, on the ground that she was no party to the deed, although she took a beneficial interest under it:—But it seems that the administrator of *C. D.* might sue, as in

case of a recovery by him, he might be considered as a trustee for such daughter. *Barford* v. *Stuckey*, 5 Moore 23.

4. Held, however, that he could not do so. *Same* v. *Same*, 1 Bing. 225.

5. Where an agent, having money in his hands belonging to his principal, bought a bill of exchange with it, which he indorsed specially to the latter, who was dead at the time of the indorsement, but of which circumstance the agent was ignorant:—Held, that the property in the bill passed to the administrator of the principal; and consequently, that he might sue on it in his character as such. *Murray* v. *East India Company*, 5 B. & A. 204.

6. Where an administratrix, after the death of the intestate, and before she obtained letters of administration, paid a sum of money to the defendant out of the assets through a misrepresentation, and to which it appeared he was not entitled:—Held, that she might recover it back in her representative character in an action for money had and received, as the sum paid was assets; and if it were wrongfully made, was recoverable as such. *Clarke* v. *Hougham*, 2 B. & C. 149.

7. Where the widow of an officer who died intestate in *India*, obtained letters of administration of her husband's effects there, and remitted the proceeds thereof in government bills to her agent in *England*; and a creditor of the intestate took out letters of administration of the intestate's effects in this country, and brought an action against the widow's agent for money in his hands as part of such effects:—Held, that the letters of administration in *India* prevailed over those granted in this country; and that the action would lie only at the suit of the widow as administratrix. *Currie* v. *Bircham*, 1 Dow. & Ryl. 35.

8. Where the defendant, acting under a power of attorney from the plaintiff, took out administration at *Bengal* to the estate of a deceased debtor, by bond to the plaintiff, and received monies under the administration:—Held, that he could not recover as against the plaintiff, on the ground of a subsequent administration obtained by other creditors in this country. *Farrington* v. *Clarke*, 2 Chit. 429.

9. *C.* in consideration of a loan of 400*l.* mortgaged his real estate in fee to *W. & Co.* in trust to sell the same; and after repaying themselves, to pay over the surplus to himself, his executors or administrators. Before the sale was effected *C.* died, after making his will, by which he devised all his real and personal estates to trustees, whom he also appointed his executors in trust to sell the same, and pay debts and discharge incumbrances. In the lifetime of these trustees, *W. & Co.* the original mortgagees, sold the estate, and paid over the surplus into the hands of the testator's trustees and executor's attorney. Before the money was disposed of, the trustees and executors, and also their attorney, died; and the plaintiffs took out administration *de bonis non*, with the will of *C.* annexed, and sued the attorney's executor in *assumpsit* for money had and received:—Held, that the money in the hands of the latter was equitable and not legal assets; and consequently, could not be recovered at law. *Clay* v. *Willis*, 2 Dow. & Ryl. 539. S. C. 1 B. & C. 364.

II. LIABILITIES.

See Ante, tit. COSTS. III.

1. A legatee, under a bequest of wines, which arrived in the port of *London* in a ship before the death of the testator, the report of the arrival of the ship being made before, but the entry of the wines not being made until after the death of the testator, is not subject to the payment of the duties; the executor being bound to pay them out of the assets. *Sewart* v. *Denton*, 2 Chit. 456.

2. The father of two illegitimate children executed a bond, conditioned for the payment of an annuity of 30*l.* for the support of them and their mother during their *joint* natural lives; or in case of the death of the children, during the natural life of the mother: one of the children having died:—Held, that the executor of the obligor was liable on the bond for the arrears of the annuity accruing after the death of that child. *James* v. *Tallent*, 1 Dow. & Ryl. 548. S. C. 5 B. & A. 889.

3. Where two makers of a promissory note gave it to a creditor of their testator, whereby "as executors they severally and jointly promised to pay on demand, with interest:"—Held, that

they were personally liable. *Childs* v. *Monins*, 5 Moore 282.

4. The executrix of an attorney is liable in an action on the case for negligence of her testator, in not making due enquiry into the validity of a security upon which his client proposed to advance money. *Wilson* v. *Tucker*, 1 Dow. & Ryl. N.P.C. 30.

5. Executors holding a defendant to bail without reasonable or probable cause for a debt due to their testator, are liable to costs under the statute 43 *Geo.* 3, c. 46, s. 3. *Feely* v. *Reed*, 5 B. & A. 515. (*n.*)

III. ACTIONS BY AND AGAINST.

See *Doe* v. *Bradbury*, 2 Dow. & Ryl. 706. Ante, page 114.

1. Where *A.* being in partnership with *B.*, the former signed an agreement on behalf of both, and *B.* survived *A.*:—Held, that an action on the agreement lay against the executors of *B.* only. *Calder* v. *Rutherford*, 3 Brod. & Bing. 302.

2. Where *A.* died intestate, and *B.* his wife took out letters of administration, and died before his effects were fully administered; and *C.* took out administration *de bonis non*, and sued *D.* as acceptor of a bill of exchange indorsed to the administratrix, in payment of a debt due to the intestate:—Held, that such action was properly brought. *Catherwood* v. *Chaband*, 2 Dow. & Ryl. 271. *S. C.* 1 B. & C. 150.

IV. PLEADINGS BY AND AGAINST.

(*a*) *Declaration.*

1. Where a defendant is described in process generally, he may be declared against as administrator; the object of the writ being merely to bring him into Court. *Watson* v. *Pilling*, 6 Moore 66. *S. C.* 3 Brod. & Bing. 4.

2. In a declaration on a bail-bond against four defendants, where one of the plaintiffs sued as administratrix of *J. C. W.* deceased, without making profert of the letters of administration; and the declaration, in reciting the writ, stated that the sheriff to whom it was directed was commanded to take "the said defendant *T. A.* to answer the plaintiffs of a plea of trespass, and *also* to a bill of the plaintiffs against the *said defendants*:—Held, on special demurrer, first, that the declaration was sufficient, without making profert of the letters of administration; but secondly, that it was bad, in not clearly shewing against whom the writ was issued, or who was the defendant in the plaintiffs' suit on the writ. *Large* v. *Attwood*, 1 Dow. & Ryl. 551.

3. An action of *assumpsit* cannot be maintained by a surviving co-executor in his own right against the surviving partner of a deceased co-executor, without stating himself to be such surviving co-executor in the declaration:—Where therefore, the plaintiff and *J. T.* were appointed co-executors, and the latter, at the time of the death of the testator, was in co-partnership with the defendant, and died, leaving the plaintiff surviving; and *J. T.* had paid large sums belonging to the testator's estate into the partnership account, which were placed to the general credit of the estate of the testator; and the defendant and *J. T.* became insolvent, and none of the funds ever came to the plaintiff:—Held, that he could not recover from the defendant in an action for money had and received, commenced by him in his own right against the defendant in his own right, and not describing him as surviving partner of *J. T.* *Fitzgerald* v. *Boehm*, 6 Moore 332.

4. Where the plaintiff as administrator, declared in *assumpsit* that the intestate had retained the defendant as his attorney, to investigate and procure a good title of an estate about to be conveyed to the intestate as purchaser; and assigned for breach that he did not do so, but accepted a bad and defective title in the lifetime of the latter, whereby his personal estate was much injured:—Held, on demurrer to the declaration, that the action was well brought; although it was objected, first, that though it was framed in contract, it was in substance a *tort*, arising from a neglect of duty by the defendant; secondly, that the heir should have sued, and not the administrator, as it was a contract which ran with the land; and lastly, that it was not alleged in the declaration that the defendant undertook to ascertain and procure a good title in his professional character as an attorney;—for by the demurrer, the defendant admitted the promise to the intestate, as well as the allegation that

the injury accrued to his personal estate during his lifetime; and it must be implied that he was bound to fulfil his duty as an attorney, it being alleged that the intestate employed him as such. *Knights* v. *Quarles*, 4 Moore 532.

5. In a declaration by executors, on a count alleging that the defendant, after the death of the testator, accounted with the plaintiffs as executors, concerning money due from the defendant to the plaintiffs as executors; and that the defendant was indebted to them upon that account as executors, and promised to pay them as such:—Held, that as it appeared on the face of the count that the plaintiffs might have sued in their own right, they were, on being nonsuited, liable to costs. *Jones* v. *Jones*, 1 Bing. 249.

6. An executor of a lessor, tenant from year to year, may declare for a breach of covenant in a lease for twenty-one years, granted by the lessor, though the breach was committed after the lessor's death. *Mackay* v. *Mackreth*, 2 Chit. 461.

7. But such a declaration should state the termor's interest and title in the premises; and where it was merely stated that *A. B.* demised premises to the testator of the plaintiff, (viz. the termor, without stating that *A. B.* was seised in fee, or of any other estate,) and that the plaintiff's testator demised them to *C. D.*, and stated a breach of covenant after the plaintiff's testator's death;—it was held bad. 2 Chit. 461.

(*b*) *Pleas and Demurrers.*

1. A party cannot be both plaintiff and defendant in an action at law; and therefore, where the plaintiff sued as executor and the defendants pleaded that the promises in the declaration were made jointly with the plaintiff:—Held a good plea in bar of the action. *Moffatt* v. *Van Mullingen*, 2 Chit. 539. *S. C.* 2 B. & P. 124. (*n.*)

2. Where, in an action upon a promissory note, the defendants pleaded that they were executors, and made the note as such, and *plene administraverunt præter;* and the plaintiff demurred specially, assigning for causes, that they had thereby made themselves personally liable, and admitted that they had assets for the payment of the note, and that it might have been given for their own debt; and that they having promised to pay with interest, they could not become liable for it in their representative character:—Held, that such plea was bad, and afforded no answer to the action. *Childs* v. *Monins*, 5 Moore 282.

V. EVIDENCE.

1. Where *A.* died intestate, and *B.* his wife took out administration, but died before his effects were fully administered; on which *C.* took out administration *de bonis non*, and sued *D.* as acceptor of a bill of exchange indorsed to the administratrix, in payment of a debt due to the intestate; and the defendant pleaded an agreement whereby all his creditors had consented to accept an assignment of certain debts and credits in full satisfaction of all their demands; and the replication denied that all the creditors had signed such agreement, upon which issue was joined:—Held, that the affirmative of such issue lay upon the defendant, and that he was bound to prove the assent of all his creditors; and it seems that he was bound to prove the assent of the plaintiff, as well as his other creditors. *Catherwood* v. *Chaband*, 2 Dow. & Ryl. 271. *S. C.* 1 B. & C. 150.

EXECUTORY DEVISE.—See DEVISE. IX.

EXTENT.

I. IN CHIEF.

1. An extent at the suit of the Crown against the debtor of its debtor has not,

before inquisition taken, the effect of divesting the Crown debtor's right to sue his debtor, or to receive the debt. *Lakeman* v. *M'Adam*, 8 Price 576.

2. An action commenced after an extent issued against the debtor of a Crown debtor, but before the taking of an inquisition under it; and proceeded in by the assignees of the plaintiff (who had in the mean time become bankrupt) in his name, after inquisition taken, and the debt so sued for had been seized under it into the hands of the Crown, and an *amoveas manus* issued, on the application of the bankrupt after issue joined:—Held to have been well proceeded in; and the Court of *Exchequer* discharged a rule for setting aside the verdict obtained and entering a nonsuit, which had been granted, on the ground that the plaintiff had no right to continue the suit under such circumstances. 8 Price 576.

3. An immediate extent, and an extent in chief in the second, or any degree, are to be satisfied before an extent in aid of a prior *teste*, where the same goods were seized under both extents, although the inquisition on the latter were taken before that on the former, and on the same day as the inquisition on the immediate extent, and the *venditioni exponas* on the extent in aid was tested before that which issued on the extent in chief in the particular degree. *Rex* v. *Larking*, 8 Price 683.

4. An extent sued out on the affidavit of one of the partners in a firm, against whom an extent has issued in chief, containing the usual averment under the rule 15, *Car.* 1, is, notwithstanding, not an extent in aid, but an extent in chief in the particular degree, and entitled to the prerogative preference in execution due to immediate extents, or extents in the first instance. 8 Price 683.

5. It is not necessary that the Crown, in proceeding to recover the debts of its debtor by extent within the first degree, should first apply the immediate debtor's proper effects in discharge of its debt, before it resorts to the debtor's debts:—And it was so held in a case of two concurrent extents, one in chief in the second degree, and the other in aid, the latter having first obtained execution of the *venditioni exponas*, and both in fact proceeding for the benefit of the Crown, the contest being between two different Boards of the Revenue. 8 Price 683.

6. An application to discharge a defendant in prison under an extent for duties in his hands, (being a part of money received by him for premiums and duties on policies as agent for an Insurance Company,) on the ground of his having been arrested by the office for the whole balance due from him to them, including such duties, before the extent issued, as to which debt he was afterwards discharged under the Insolvent Act,—was refused, by discharging a rule to shew cause: the Court of *Exchequer* holding, that such a ground raised a question of merits which could not properly be brought before them but by traversing the inquisition: and that they could not set aside an extent *quia improvidè emanavit*, on motion, on a statement of such facts by affidavit as would amount to a defence. *Rex* v. *Seton*, 8 Price 671.

II. IN AID.

1. Where the sheriff seized goods, &c. of a defendant under a *fieri facias*, sued out on a judgment, recovered at the suit of a subject creditor; and after the seizure, but before the sale of the goods by the sheriff, a writ of extent in aid issued, tested after the seizure and founded on a commission to find debts, dated, and an inquisition taken thereon, the same day as the *teste* of the extent was put into the sheriff's hands to be executed:—Held, that the extent attached upon the goods so taken whilst remaining unsold in the sheriff's hands. *Rex* v. *Giles*, 8 Price 293.

But Mr. Baron *Wood* dissented, assigning as a reason, that as the writ of *fieri facias* had been in fact and in law executed by the seizure, the Crown process coming to the sheriff after he had seized, was too late; because the property was altered, and divested out of the debtor on the seizure by the sheriff, which is the perfecting of the execution, the subsequent sale being merely a formal part of the sheriff's duty. 8 Price 293.

Quære—In what stage of the execution the property in the debtor's goods is divested out of the debtor, and transferred to the judgment creditor?—Or

when an execution may be considered as having been executed? 8 Price 293.

But see *Attorney-General* v. *Fort*, 8 Price 364. (*n*). Ante, page 132.

2. When an extent in chief has been satisfied, the parties prosecuting the extent in aid should apply to the Court of *Exchequer* by motion, to be paid out of the overplus, (if any,) which under the 57 *Geo.* 3, c. 117, sess. 2, is ordered to be paid into Court to abide its orders respecting it. *Rex* v. *Larking*, 8 Price 683.

3. It is not necessary that the affidavit made to obtain the *fiat* of a Baron for an extent, should contain any allegations tending to shew that the party on whose behalf the application proceeds, is without the restraining provisions of the 57 *Geo.* 3, or that it should set out the condition of the bond for that purpose:—It is enough that a Baron be satisfied that there is ground for granting a *fiat* for the extent.—The statute does not require that such a course should be adopted; nor has it affected in any respect the old practice observed in such preliminary matters. *Rex* v. *Dineley*, 9 Price 311.

4. *Quære*—Whether an assignment, when made by deed for the benefit of creditors, by a party whose goods were at the time in the possession of the sheriff, having been taken under a *fieri facias*, a writ of extent coming to the hands of the sheriff after the assignment was executed, and before the goods were sold, and whilst the sheriff and landlord were in possession, was available to pass the property professed to be assigned? *Rex* v. *Evans*, 9 Price 366.

5. By an inquisition on a writ of extent, it was found that property of the defendant had been seized by the sheriff, and in part sold under several writs of *fieri facias*; and that part of the goods had also been taken under a distress for arrears of rent; and that before the issuing of the writ of extent, but after the seizure under the writs of *fieri facias* and the taking by distress, and whilst the property was in the possession of the sheriff, the defendant assigned it by indenture to the claimants, upon trust for the general benefit of his creditors who might choose to take the benefit thereof; and the sheriff thereupon returned, that he had also seized the same property into the King's hands, under and by virtue of the writ of extent, which had issued and come to his hands subsequent to the seizure under the writs of *fieri facias* and the taking by distress; and that he held the same, and the money arising by the sale, subject to legal claims:—the assignees claiming the property, pleaded the indenture of assignment; and averred, that after the making the said indenture, and before the issuing the extent, *the defendant delivered and the claimants took possession of the property under the deed; and that they were, at the time of the issuing of the said writ of extent, entitled to the same* upon the trusts, &c., and that at the time of the issuing of the said extent, *they were possessed of and entitled thereto;* and that *the said indenture was made bonâ fide*, and without fraud, for the benefit, &c.:—Replications to that plea by the Attorney-General, traversing the possession by and title of the assignees, in the terms of the plea, were held to be specially demurrable, as traversing an immaterial averment and surplusage:—Held also, that an inducement to some of the replications, alleging the fact of the sheriff's possession at the time of making the indenture, &c., as found by the inquisition, did not cure the informality of a subsequent traverse in the same replication, of the possession by the assignees. Leave however was given to the Attorney-General to amend, on the terms of withdrawing a replication of *non est factum*, and paying the costs. *Rex* v. *Evans*, 9 Price 366.

FACTOR.—See tit. Agent. Ante, page 9.

FELONY.—See Post. tit. Indictment.

FEME COVERT.—See tit. Baron and Feme. Ante, *passim*.

FINE OF LANDS.

I. BY WHOM AND HOW LEVIED, AND WHO ARE BARRED THEREBY.

1. By a marriage settlement of *December* 1806, certain manors and lands were limited to the use of the husband for life; remainder to the use of the wife for life; remainder in strict tail male; remainder to the wife in fee, in case she should survive her husband; but if she should die in his lifetime, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, as the wife by her will might appoint; and in case of no such appointment, to the wife in fee. The settlement also contained a power for the trustees, at the request and by the direction of the husband and wife, or the survivor, to sell or exchange the settled estates, and for that purpose to revoke all or any of the uses contained in the settlement; and also a covenant for further assurance on the part of the husband and wife, and all persons claiming under the husband. In pursuance of this settlement certain fines were levied. By deed, dated *March* 1807, reciting the settlement, and the fines levied in pursuance thereof, and the limitations therein contained; and further, that the wife was desirous of acquiring an absolute power of appointment over the manors and lands comprised in the settlement, in the event of her surviving; or dying in the lifetime of her husband, and there being a general failure of issue of her body, inheritable to the manors, &c. under the settlement, the husband and wife covenanted to levy certain fines, *sur conusance de droit come ceo*, with proclamations to *J. G.* and his heirs, of all the manors, lands, &c. comprised in the settlement; which fines were to operate, and to be taken to operate, first for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee simple, and subject thereto to the use of such persons as the wife by will or deed might appoint. In pursuance of this latter deed, several fines *come ceo*, were levied by the husband and wife:—Held, that these latter fines did not operate to extinguish or suspend the right or power of the husband and wife, or the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees. *Jersey (Earl and Countess)* v. *Deane*, 5 B. & A 569.

2. On the 1st *May*, 1780, *A.* mortgaged his premises to *B.* in fee, with a proviso for redemption on payment of the mortgage money, with interest, on the 3d *November* following, but continued in possession until his death; and after his death, his son and heir, and his widow, continued in possession until the death of the latter in 1813. *C.*, his son and heir, conveyed the premises in fee, in 1806, to *D.*, who levied a fine with proclamations and entered into possession:—on ejectment being brought by *E.*, the heir-at-law of *B.*, the original mortgagee, and on special verdict found, stating the fact of the non-payment of the mortgage debt, without finding either an adverse possession by *A.* or his heir, or that interest had been paid upon the mortgage-money:—Held, that the fine levied with proclamations, though there was no entry within five years to avoid it, did not conclude the lessor of the plaintiff. *Hall* v. *Doe d. Surtees*, 1 Dow. & Ryl. 340. *S. C.* 5 B. & A. 687.

3. Under a devise to trustees in fee, to permit *A. H.* to receive the rents and profits for life; remainder to *W. H.* in tail; remainder to *J. S.* in fee:—Held, that a fine with proclamations, levied by *W. H.* to a stranger in the lifetime of *A. H.*, was void, and could not operate to pass an interest; and consequently, that the heir of *J. S.* was not barred by non-claim and want of entry. *Doe d. James* v. *Harris*, 5 M. & S. 326.

And see *S. C.* Post. tit. VARIANCE.

II. WHEN AND HOW PASSED;—AND ACKNOWLEDGMENT, HOW TAKEN.

1. The Court of C. P. would not suspend the granting the *fiat* of a fine on an

affidavit that the deforciant was nearly one hundred years of age, and of imbecile mind. *Price* Demandant, *Watkins* Deforciant, 1 Bing. 73.

2. A fine of *Trinity* Term 1814, rejected as being out of time, was not suffered to pass, although all the parties were alive; there being no affidavit stating that the papers were mislaid, or assigning any other reason for the delay. *Inglis* Plaintiff, *Heald* Deforciant, 8 Taunt. 442.

3. But a fine, the date of which was not sworn to, but which had also been rejected as out of time, was suffered to pass on an affidavit that, after the due taking of the acknowledgment, the papers had been laid aside and forgotten in the office of the attorney, and that all the parties were still alive. *Lidbetter* Plaintiff, *Barton* Deforciant, 8 Taunt. 438.

4. So, if documents for passing a fine be mislaid in the cursitor's office, the Court of C. P. will allow it to pass, although one of the conusors be dead, and the acknowledgment was taken more than twelve months before the application was made, on an affidavit stating the time of the death of such conusor. *Fitchley* Plaintiff, *Jervis* Deforciant, 6 Moore 315.

5. If the caption of a fine abroad be stated to have been taken before *A.* and *B.*, and the affidavit of such caption states that it was taken before *A.* and *C.*:—that Court will not permit such fine to pass. *Maidment* Plaintiff, *Proctor* Deforciant, 6 Moore 517.

6. The certificate of a notary of the acknowledgment of a fine taken abroad, must be written on parchment, and a literal translation of it engrossed on parchment; and referring to the original, will not supply the defect. *Randall* Plaintiff, *Lowring* Deforciant, 6 Moore 232.

III. AMENDMENT OF.

1. On motion to amend a fine, an affidavit must be produced, stating that the possession had followed such instrument since it was levied. *Bisgood* Demandant, 6 Moore 259.

2. If wood land be converted into arable, the Court of C. P. will not allow a fine to be amended by increasing the quantity of the latter, as the land would pass under either description. *Webber* Plaintiff, *Grey* Deforciant, 5 Moore 94.

3. But it may be amended by inserting the words "one fourth part," in conformity with the deed to lead the uses. *Wilmot* Plaintiff, *Clarke* Deforciant, 8 Taunt. 335.

4. And if a parish be misdescribed by name in a fine and deed to lead the uses, the former may be amended by substituting the right name, if the deed contains general words under which the premises in such parish may pass. *Anonymous.* 6 Moore 520.

FISHERY.

See also tit. CONVICTION. Ante, page 7?

1. A Canal Act provided "that it should be lawful for the owners of the lands on which any reservoir should be made, to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein:"—Held, that each owner had separate interests and a several right of fishery in the water which covered his own land, and were not tenants in common of such fishery. *Snape* v. *Dobbs*, 1 Bing. 202.

2. The owner of a several fishery is *primâ facie* the owner of the soil. *Partheriche* v. *Mason*, 2 Chit. 658.

FIXTURES.

1. A conservatory erected on a brick foundation, affixed to and communicating with rooms in a dwelling-house by windows and doors, cannot be re-

moved by a tenant for years, who had erected it during his tenancy, although he had a reversion in fee after the death of his lessor. *Buckland* v. *Butterfield*, 4 Moore 440.
S. C. 2 Brod. & Bing. 54.

2. So, the machinery of a mill is part of the freehold, and cannot be legally removed by the tenant. *Farrant* v. *Thompson*, 2 Dow. & Ryl. 1.
S. C. 5 *B.* & A. 826.

3. A sheriff cannot take in execution, fixtures consisting of ranges, ovens, and set pots, affixed to a freehold house, which was built by the person against whom the execution issued. *Wynne* v. *Ingleby*, 1 Dow. & Ryl. 247.
S. C. 5 B. & A. 625.

4. Where a freehold mansion-house was sold at public auction, without any stipulation on the part of the owner that the fixtures were to be taken and paid for separately; and the vendee, who had paid the purchase-money, entered into possession under a conveyance:—Held, that the fixtures still remaining in the house passed to the vendee by the conveyance of the freehold, and were not the subject of trover:—Held also, that a demand of and refusal to deliver *fixtures*, would not entitle the vendor to such articles left in possession of the vendee, as appeared to be moveable goods and chattels. *Colegrave* v. *Dias Santos*,
3 Dow. & Ryl. 255.
S. C. 2 B. & C. 76.

FOREIGN ATTACHMENT.

1. Where judgment had been obtained in the Lord Mayor's Court, against a garnishee who had removed his person and effects out of the jurisdiction of that Court:—Held, that execution could not issue against him out of the Court of *King's Bench*, under the statute 19 *Geo.* 3, c. 70, s. 4, as that statute is confined to those suits in inferior Courts, where the proceedings are similar to those in the Courts above. *Bulmer* v. *Marshall*, 1 Dow. & Ryl. 537
S. C. 5 B. & A. 821

2. A sum directed to be paid by *A.* and *B.* by the award of an arbitrator, cannot be attached in the hands by process issued out of the Sheriff's Court of the city of *London*, at the suit of a creditor of *B.*—Therefore where a rule *nisi* had been obtained against *A.* in the Court of *King's Bench* for contempt, in not paying money pursuant to an award:—Held, that it was no ground for opposing the rule for an attachment, that by the process of the Sheriff's Court, the money was attached in his hands to answer the debt of *B.*'s creditors. *Caila* v. *Elgood*, 2 Dow. & Ryl. 193.

3. In a plea of foreign attachment, it is necessary to aver that the garnishee resided within the jurisdiction of the Mayor's Court. *Tamm* v. *Williams*,
2 Chit. 438.

Quære—Whether it is not also necessary to aver that the defendant, in the action in that Court, had notice of the custom, and of the attachment against the garnishee? 2 Chit. 438.

FOREIGN LAWS.

1. The Courts of this country will not take notice of the revenue laws of foreign states. *James* v. *Catherwood*,
3 Dow. & Ryl. 190.

2. On a plea of coverture, where the parties, *British* subjects, were married in *France*:—Held, that if the marriage would not be valid in that country, it would not be so in this. *Lacon* v. *Higgins*, 1 Dow. & Ryl. N.P.C. 38.
And see *Broun* v. *Gracey*, id. 41. *n.*

FORFEITURE.—See Post. tit. LEASE.

FORGERY.—See Post. tit. INDICTMENT.

FORMEDON.—See LIMITATIONS, STATUTE OF.

FORMER RECOVERY.

1. A plea of a judgment recovered of a Term before the cause of action arose, may be treated as a nullity; and the plaintiff may sign judgment without previously obtaining leave of the Court. *Lamb* v. *Pratt*, 1 Dow. & Ryl. 577.

FRAUDS, STATUTE OF.

I. AGREEMENTS.

(a) Promises on behalf of Third Persons.

See also tit. GUARANTIE. Post. page 146.

1. To bring a guarantie within the statute 29 *Car.* 2, c. 3, s. 4, the consideration must be stated on the face of it; but no notice of non-payment by the principal, or demand on the surety, seems necessary to be averred or proved. *Atkinson* v. *Carter*, 2 Chit. 403.

2. The defendant gave the following note to the plaintiffs, which he dated and signed:—" I hereby guaranty the present account of *Miss H. M.* due to *R. T. S. & Co.* (the plaintiffs) of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th *September* next;"—it seems that the consideration sufficiently appeared on the face of the instrument to bind the defendant, under the statute. *Russell* v. *Moseley*, 6 Moore 521. *S. C.* 3 Brod. & Bing. 211.

3. But where the defendant addressed the following letter to the plaintiffs, which he dated and signed: " To the amount of 100*l.* consider me as security on *J. C.*'s account:"—Held, that it was not a sufficient memorandum to bind the defendant under the statute; the consideration or promise for the undertaking not having been expressed in such letter. *Jenkins* v, *Reynolds*, 6 Moore 86. *S. C.* 3 Brod. & Bing. 14.

4. A memorandum written by the plaintiff's clerk, in the presence of the defendant, that " the latter had called to say, that he would be responsible for goods delivered to *Mr. H.*;"—is not a sufficient undertaking within the statute. *Dixon* v. *Broomfield*, 2 Chit. 205.

5. Where *A.* by letter entered into an agreement with *B.*, who acknowledged its terms by writing a memorandum at the foot of a copy of the letter, and signing it; and afterwards *C.* became guarantie for *B.* to *A.* by an indorsement on the back of the copy of the same letter, referring to the terms of the agreement therein contained:—Held, in an action on the guarantie, that the reference by the indorsement to the terms, as forming part of one transaction of the agreement, was a sufficient memorandum of the consideration within the statute. *Stead* v. *Liddard*, 1 Bing. 196.

(b) Sale or Interest in Lands.

1. In *assumpsit* for goods sold, and on an account stated, to recover the value of growing poles purchased from the plaintiff by the defendants, and afterwards carried away by them; it appeared in evidence, that at the time of the bargain some memorandums in writing had been made, but which were neither stamped nor signed by the parties. It was also proved, that the defendants, after the poles were carried away, admitted that a balance was due to the plaintiff. Under these circumstances the plaintiff was nonsuited:—Held, that such nonsuit was proper, as it was not proved that the defendants had admitted a precise and definite sum to be due to the plaintiff; and therefore, that he could not recover on the account stated, without reference to the memorandums, which were not admissible in evidence: but as the contract had been executed by the defendants, they having carried away the

poles, the Court of C. P. granted the plaintiff a new trial on payment of costs. *Teall* v. *Auty*, 4 Moore 542.

(c) *Sale of Goods.*

1. The agent contemplated by the 17th section of the statute of Frauds, who may bind a defendant by his signature to the memorandum of a bargain, must be a third person, and not the other contracting party. Where therefore, an auctioneer wrote the name of the defendant in his book opposite to a lot purchased:—Held, in an action brought in the name of the auctioneer, that such entry was not sufficient to take the case out of the statute. *Farebrother* v. *Simmons*, 5 B. & A. 333.

2. *A.* and *B.* being jointly interested in a quantity of oil, *A* entered into a contract for the sale of it without the authority or knowledge of *B.*, who, on receiving information of the circumstance, refused to be bound by it, but afterwards assented by parol, and samples were delivered to the vendees:—Held, in an action brought against them, that *B.*'s subsequent ratification of the contract rendered it binding; and that it was to be considered as a contract in writing within the statute. *Soames* v. *Spencer*, 1 Dow. & Ryl. 32.

3. Where goods were ordered by parol by a country dealer, of a *London* wholesale house; and the latter delivered them at a wharf to be forwarded to their place of destination by sea; and the ship in which they were sent was lost, and the goods were never received in the country:—Held, that the acceptance of the goods by the wharfinger was not such an acceptance as would satisfy the words of the 17th section of the statute, which requires an acceptance by the party himself to make him liable in the absence of a written contract. *Hanson* v. *Armitage*, 1 Dow. & Ryl. 128. *S. C.* 5 B. & A. 557.

4. But a parol contract for the sale of 300 sacks of flour, "to be prepared and shipped by a certain day," is within that section. *Garbutt* v. *Watson*, 1 Dow. & Ryl. 219. *S. C.* 5 B. & A. 613.

5. Where the purchaser of 100 sacks of good *English* seconds flour, at the price of 45*s.* *per* sack, wrote to the vendors, giving them notice that "the corn delivered in part performance of his contract with them for 100 sacks of good *English* seconds flour at 45*s.* *per* sack, was of so bad a quality that he could not sell it, or make it into saleable bread; and that the sacks of flour were at his shop; and he required the vendors to send for them, or otherwise that he should commence an action:"—To which the vendor's attorney answered, that "they considered they had performed their contract as far as it had gone, and that they were ready to complete the remainder; and that unless the flour was paid for at the expiration of one month, proceedings would be taken for the amount:" — Held, that the two writings, taken together, constituted a sufficient memorandum of the contract within the 17th section of the statute. *Jackson* v. *Lowe*, 1 Bing. 9.

6. Where the traveller of a mercantile house in *London* received an order from a country manufacturer for a cask of cream of tartar, and also an offer to purchase two chests of lac dye at a given price; and the traveller undertook to send both articles, but stipulated on the part of his principals, that they should be at liberty to refuse to fulfil the contract as to the lac dye, on the terms proposed, by writing to the vendee to that effect by return of post, or the post following; and no answer was sent back, but shortly afterwards the goods were delivered: and the vendee accepted the cream of tartar, but refused to take the lac dye:—Held, that this was not an acceptance to take the case out of the statute, and render the vendee liable for the latter article; the contract not being entire. *Price* v. *Lea*, 2 Dow. & Ryl. 295. *S. C.* 1 B. & C. 156.

7. Where a person selected various articles in a tradesman's shop, some of which he marked with a pencil and others were cut from piece-goods, and laid aside for him, (the whole amounting to more than 10*l.*,) and he desired them to be sent to his house; and when sent, he refused to take them:—Held, that this was one contract; but that there was no acceptance to take the case out of the statute. *Baldey* v. *Parker*, 3 Dow. & Ryl. 220. *S. C.* 2 B. & C. 37.

8. The plaintiff sold a horse to the defendant for 30*l.* by parol agreement; and the horse was to be fired and remain, in the plaintiff's possession until

he was fit to be sent to grass. At the end of twenty-two days, the horse was, by the defendant's directions, sent to graze at *Kimpton Park*, and there entered in the plaintiff's name:—Held, that there was no delivery to or acceptance of the horse by the defendant, to satisfy the 17th section of the statute. *Carter* v. *Toussaint*,
1 Dow. & Ryl. 515.
S. C. 5 B. & A. 855.

II. WILL OF LANDS.

See also Post. tit. WILL.

1. Where a will which was written on three sides of one sheet of paper, and duly attested by three witnesses, concluded by stati g "that the testator had signed his name to the two first sides thereof, and his hand and seal to the last;" and it appeared that he had put his name and seal to the last only, but had omitted to sign his name to the two first sides:—Held, that the will was well executed; as, whatever might have been the testator's former intention, it was abandoned by the final signature made by him at the time of executing the will. *Winsor* v. *Pratt*,
5 Moore '84.

2. Where an estate in fee, on the determination of a life estate, was devised to the wife of one of the attesting witnesses to the will, and the testator and devisee died before the life estate was determined:—Held, that the husband of the devisee was not a good attesting witness to the will. *Hatfield* v. *Thorp*,
5 B. & A. 589.

FRAUDULENT CONVEYANCE.

And see tit. DEED. III. Ante, page 97.

1. Where *A.* by deed assigned all his effects at *W.* to trustees, for the benefit of certain creditors for four years; and the trustees were empowered to sell at the expiration of two years, or sooner, if *A.* should direct, and apply the proceeds of the sale in discharge of the debts of such creditors; who covenanted that *A.* might continue at home or abroad, and that they would not molest him for two years from the date of the deed:—Held, that such assignment was valid, and not within the statute 13 *Eliz.* c. 5; and that the property was thereby protected against a judgment creditor, who had sued out execution against *A.* after the deed was executed. *Goss* v. *Neale*, 5 Moore 19.

FREIGHT.

See also tit. CHARTERPARTY, Ante. page 76.

1. Where, by a charterparty, the owners let a vessel to freight by the month, for such time as she should be taken up in performing a voyage from *London* to *Plymouth*, the island of *Grenada*, and from thence back to *London*, on the terms that the owners should receive, and the freighters should load and unload a cargo at *Grenada*, on such outward and homeward voyage; such intent must be construed to mean two distinct voyages from *London* to *Grenada*, and thence back to *London*, and not as one entire voyage; and where the vessel, having unloaded a cargo at *Grenada*, and loaded another, but on her return to *London* was, with the cargo, entirely lost:—Held, that the owners were entitled to freight for the voyage to *Grenada*. *Mackrell* v. *Simond*,
2 Chit. 666.

2. Where, by a bill of lading, goods were to be delivered "to the defendant, nett proceeds paid to the plaintiff or to his assigns, he or they paying freight for the said goods as *per* charterparty:"—Held, that the freight was to be paid by the defendant; and that the nett proceeds to be paid the plaintiff were what remained after such freight and other charges had been satisfied. *Thomson* v. *Adam*, 5 Moore 280.

FRIENDLY SOCIETY.

1. A bond given to the plaintiff as the Treasurer of a *Friendly Society*, for the use of the Society, is an available security at common law, though the rules and regulations of the Society have not been confirmed at the *Quarter Sessions*, in pursuance of the statute 33 *Geo.* 3, c. 54, s. 2. *Jones* v. *Woollams*, 1 Dow. & Ryl. 393. *S. C.* 5 B. & A. 769. 2 Chit. 322.

GAME.

I. QUALIFICATION.

(*a*) *By Estate.*

1. A conveyance of land, in order to give a qualification to kill game, is valid, and conveys such qualification. *Doe d. Roberts* v. *Roberts*, 2 Chit. 272. *S. C.* 2 B. & A. 367.

2. In an action of debt, to recover penalties from an unqualified person for killing game, who had paid one penalty into Court and pleaded the general issue; the only evidence of qualification offered by him at the trial, was certain deeds of lease and release to his father, and his father's possession; and it was objected that such evidence was insufficient, but the Judge held it sufficient to go to the Jury:—the Court of *Exchequer* afterwards refused a rule for a new trial, holding that very slight proof of qualification was sufficient in such cases, unless rebutted by other evidence. *Smyth* v. *Jefferies*, 9 Price 257.

II. PENALTIES.

(*a*) *Where they attach.*

1. To constitute the offence of keeping a setting-dog within the statute 5 *Anne*, c. 14, s. 4, it must be kept for the purpose of killing and destroying game:—Therefore, where it appeared that at the time the alleged offence was charged to have been committed, the dog was tied up, and never had been taken out into the field by his master:—Held not to be an offence within the meaning of the statute. *Hayward* v. *Horner*, 5 B. & A. 317.

And see *S. P.* where a dog was kept as a house-dog. *Briarly* v. *Athorpe*, 5 B. & A. 320. (*n.*)

III. CONVICTION.

(*a*) *Form and Requisites of.*

1. A conviction on the statute 5 *Anne*, c. 14, s. 4, for keeping and using a gun to kill and destroy game without being qualified, must be made within three lunar months after the offence committed. *Rex* v. *Bellamy*, 2 Dow. & Ryl. 727. *S. C.* 1 B. & C. 500.

2. And a conviction under that statute, stating in the information that the defendant "killed a hare,"—is bad. *Rex* v. *Morgan*, 2 Chit. 563.

GAMING.

See *Carter* v. *Abbott*, 2 Dow. & Ryl. 575.
Post. tit. RELEASE.

1. Keeping and maintaining a common gaming-house, and, for lucre and gain, causing and procuring idle and evil-disposed persons to come there to play together at "*Rouge et Noir*," and permitting such persons to play at such

game for large sums of money,—is an indictable offence at common law; and it seems that an indictment may be sustained for merely charging a person with keeping a common gaming-house. *Rex* v. *Rogier*, 2 Dow. & Ryl. 431. *S. C.* 1 B. & C. 272.

2. Where a bill of exchange was accepted in consideration of a gambling debt, it is within the statute 9 *Anne*, c. 14, s. 1; although the drawer was an entire stranger to the acceptor and the person for whose benefit it was accepted; and although the bill was indorsed and delivered over before acceptance to the party who had prevailed on the drawer to draw it. *Henderson* v. *Benson*, 8 Price 281.

GAOL AND GAOLER.

1. The Court of *King's Bench* has no authority to interfere in the regulation and management of the gaols of the kingdom:—Therefore, where persons had been found guilty of a misdemeanor, and confined in a county gaol under the sentence of the Court, prayed to be allowed the same indulgences as prisoners confined for felony,—the Court refused to make any order upon the gaoler for that purpose. *Rex* v. *Carlile*, 1 Dow. & Ryl. 535.

GRANT.

See also tit. ANNUITY. Ante, page 14.

1. Where lands were granted in the occupation of a particular person who had been dead two years previous to the making of the grant, and the Jury found that the intention was to grant certain lands, but the words were not sufficient to express that intention:—Held, that such finding was right. *Beaumont* v. *Field*, 2 Chit. 275.

GUARANTIE.

See also *Laing* v. *Barclay*, 2 Dow. & Ryl. 530. *S. C.* 1 B. & C. 398. Ante, page 11.
See also tit. FRAUDS, STATUTE OF. Ante, page 142.

1. A guarantie is merely a contract to indemnify upon a contingency; and being in the nature of a claim for unliquidated damages, it cannot form the subject of a mutual credit, under the statute 5 *Geo.* 2, c. 30, s. 28. *Sampson* v. *Burton*, 4 Moore 515.

2. The consideration must be distinctly stated on the face of a guarantie; but no notice of non-payment by the principal, or demand on the surety, seems necessary to be averred or proved; for a surety is bound to enquire whether the principal has paid or not. *Atkinson* v. *Carter*, 2 Chit. 403.

3. A guarantie for the payment of coals to the amount of 50*l.*, for which the defendant would be answerable at any time, is not a continuing guarantie. *Bovill* v. *Turner*, 2 Chit. 205.

4. Where *A.* wrote an order to *B.*, to deliver two pipes of spirits to *C.*; and it was objected that it did not amount to a guarantie, but was a mere order for the delivery of goods, without any promise to pay for them:—Held, that the effect of the order was either to make *A.* the principal debtor for or in the place of *C.*, or to make him answerable for the debt, if *C.* should make default. *Langdale* v. *Parry*, 2 Dow. & Ryl. 337.

5. Where the defendant signed and gave a guarantie to the plaintiff, stating that his ship was chartered; and the charterer having paid one-half the freight, and given the plaintiff his acceptance for the remaining half at four months' date, the defendant engaged to be accountable to the plaintiff for the amount of the said acceptance, should it

not be paid when due:"—Held, that the consideration clearly appeared on the face of such guarantie, as the bill would not have been taken unless thus signed. *Pace* v. *Marsh*, 1 Bing. 216.

6. Where a commission-broker effected the sale of wool from the plaintiff to *C.* and *P.* to be paid for by a bill at eight months, accepted by the latter; and the broker agreed to guaranty half the amount for an allowance of one *per cent.*; and the plaintiff confirmed the sale, and informed the broker that if he could not procure from *C.* and *P.* acceptances of approved houses, (which they would prefer,) that they would take his guarantie for one-half the amount on the terms proposed; and the wool was delivered to the vendees without the intervention of the broker, and the vendors took the acceptance of the former for the amount of the wool, made payable at a banker's; but before the bill was at maturity the vendees became insolvent, and the vendors resorted to the broker upon his guarantie:—Held, that he was liable, though the bill had not been presented for payment, and though there was no proof that it would not have been paid if presented. *Holborow* v. *Wilkins*, 2 Dow. & Ryl. 59. *S. C.* 1 B. & C. 10.

HABEAS CORPUS.

I. HOW, AND ON WHOSE APPLICATION GRANTED.

1. The writ of *habeas corpus*, whether at common law, or under the 31 *Car.* 2, c. 2, does not issue as a matter of course upon application in the first instance; but must be grounded on an affidavit, upon which the Court are to exercise their discretion whether the writ shall issue or not. *Rex* v. *Hobhouse*, 2 Chit. 207. *S. C.* 3 B. & A. 420.

2. The Court of K. B. will grant a *habeas corpus* to the *Warden* of the *Fleet*, to take the body of a prisoner confined there for debt before a magistrate, to be examined from day to day respecting a charge of felony or misdemeanor. *Ex parte Griffiths*, 5 B. & A. 730.

3. A *habeas corpus cum causâ* does not lie to remove the proceedings from an inferior jurisdiction into the Court of K. B., unless it appears that the defendant is actually or virtually in the custody of the Court below. *Mitchell* v. *Mitchinham*, 2 Dow. & Ryl. 722. *S. C.* 1 B. & C. 513.

4. The Court of *Exchequer* will not grant a *habeas corpus* to enable the defendant in an information, who is confined in a county gaol for a libel under the sentence of another Court, to attend at *Westminster* to conduct his defence in person:—the application should be made to the Court by whom the defendant was sentenced. *Attorney-General* v. *Hunt*, 9 Price 147.

II. DISCHARGE UNDER, WHO ENTITLED TO.

1. Where a defendant was committed by an Ecclesiastical Judge of appeal for contumacy in not paying costs, and the *significavit* only described the suit to be "*a certain cause of appeal and complaint of nullity*," without shewing that the defendant was committed for a cause within the jurisdiction of the Spiritual Judge:—Held, that the defendant was entitled to be discharged on *habeas corpus*. *Rex* v. *Dugger*, 1 Dow. & Ryl. 460. *S. C.* 5 B. & A. 791.

2. Where prisoners, taken into custody after an engagement at sea between a revenue cutter and a vessel suspected to be a smuggler, of which the prisoners were the crew, were delivered on board a king's ship, and detained fourteen days without any warrant, and were afterwards brought up by *habeas corpus* to be discharged; and it appearing from the return that there was cause to suspect them of felony, the Court refused a discharge, and directed them to be committed to the custody of the *Marshal* of the *Marshalsea*, in order that they might be taken before a competent tribunal to be dealt with according to law. *Ex parte Krans*, 2 Dow. & Ryl. 411. *S. C.* 1 B. & C. 258.

HAWKER AND PEDLAR.

For the Form of a Conviction under the Hawkers' Act, 25 *Geo.* 3, c. 78, (now repealed,) see *Rex* v. *Selway*, 2 Chit. 522. Ante. page 80.

1. A person buying books in sheets, and making them up, and then going from *London* into the country and selling them there, is within the Hawkers' and Pedlars' Act, 50 *Geo.* 3, c. 41, and is not exempted from penalties as the maker of the goods. *Moore* v. *Edwards*, 2 Chit. 213.

2. Since the passing of that statute, the manufacturer of goods can only hawk them in those places which are specified in the 23d section of the act; and where the defendant was convicted in a penalty of 10*l.* for trading as a hawker, *without any licence* so to do:—Held, that he was convicted in the proper sum. *Rex* v. *Websdell*, 2 B. & C. 136.

3. So a person exposing to sale and selling tea, as a hawker, without a licence, is liable to the penalty imposed by the 23d section of that statute on hawkers trading without a licence, although he would be liable to a penalty for selling tea in an unentered place, even if he had a licence; and the defendant having been convicted in a penalty of 10*l.*:—Held, that it was the correct sum. *Rex* v. *M'Gill*, 2 B. & C. 142.

N. B.—In this case, the provisions of the former statutes relative to hawkers were fully considered and expounded by the Court.

HIGHWAYS.

I. HOW CONSTITUTED.

See also Post. tit. Inclosure Acts.

1. A highway may be created by an Act of Parliament. *Sutcliffe* v. *Greenwood*, 8 Price 535.

2. Where a way has been used by the public for a great number of years over a close, leading only to the houses of lessees, there being no thoroughfare; the privity of the landlord, and a dedication by him to the public, are essential to constitute it a public highway;—and evidence that the *locus in quo* has been paved and lighted for the like number of years, under the authority of a public, local, and personal Act of Parliament, in which it is enumerated by name amongst the public streets, lanes, &c. within the scope of the statute, does not prejudice the reversionary rights of the owner of the fee. *Wood* v. *Veal*, 1 Dow. & Ryl. 20. *S. C.* 5 B. & A. 454.

Quære—Whether there can be a public highway which is not a thoroughfare? 1 Dow. & Ryl. 20. *S. C.* 5 B. & A. 454.

II. HOW STOPPED UP, CHANGED, OR DIVERTED.

For the power and duty of Commissioners to stop up highways under Inclosure Acts, see Post. tit. Inclosure Acts.

1. An order made by Justices of Peace, under the statute 55 *Geo.* 3, c. 68, s. 2, for stopping up an old highway, and setting out a new one, must shew that it was made with the consent in writing, under the hand and seal *of the owner* of the land through which the new highway is proposed to be made.—Where, therefore, an order made under that statute, recited that the Justices had received evidence of the consent of *T. J.* Esq. *in his lifetime*, to the new road being carried through his lands, by writing under his hand and seal, and it appeared that another person was owner of the land at the time the order was made:—

Held, that such order was insufficient, and could not be carried into execution. *Rex* v. *Denbighshire (Justices)*,
2 Dow. & Ryl. 52.
S. C. nomine Rex v. *Kirk*,
6 B. & A. 21.

2. So, where an order of Justices for turning a footpath was founded upon a consent, signed and sealed by the attorney of the parties in and through whose ground the new road was to pass; there being nothing to bind the principal:—Held ill, and quashed by the Court, after confirmation by Sessions. *Rex* v. *Crewe*, 3 Dow. & Ryl. 6.
S. C. nomine Rex v. *Kent (Justices)*,
1 B. & C. 622.

3. An order made under the statute 55 *Geo.* 3, c. 68, s. 2, cannot be confirmed till the Sessions held next after the expiration of four weeks from the first day on which the notices required by law shall have been published:—Where, therefore, an order was made for diverting a path, and notice thereof given on the 20th *December*, and it was confirmed at Sessions on the 17th *January*:—Held irregular, and quashed.
3 Dow. & Ryl. 6.
S. C. 1 B. & C. 622.

4. *Quære*—Whether an order for diverting and turning an old road, need set out the names of the owners of the land through which the new road is proposed to be carried? *Rex* v. *Casson*,
3 Dow. & Ryl. 36.

And see *S. C.* tit. Certiorari, II. 4. Ante. page 75.

5. *Quære*—Whether, in the case of stopping up a way under an Inclosure Act, the Commissioner is bound to give the notices required by the 55 *Geo.* 3, c. 68. *Rex* v. *Townsend*,
5 B. & A. 424.

III. Assessments, on whom and how levied.

See also Post. tit. Turnpike.

1. It seems, that in order to justify magistrates in granting an authority to collect a composition in lieu of statute duty, it should be made to appear upon oath to such magistrates, that the road can be more effectually repaired by such composition;—and where the composition is to be collected in several townships, it ought to appear on the face of the warrant authorising the composition, that, in the opinion of the magistrates, a composition in lieu of statute duty is admissible in each particular township. *Stanley* v. *Fielden*, 5 B. & A. 425. 436.

2. *Quære*—Whether a rector, who lets his tithes by parol from year to year to the occupiers of the lands in respect of which the tithes arise and are produced, and receives a half-yearly composition in the nature of rent, can be treated as an *occupier* of tithes within the meaning of the general Highway Act, 13 *Geo.* 3, c. 78, s. 34, and rateable to the repair of the highways in the parish? *Rex* v. *Buckinghamshire (Justices)*,
2 Dow. & Ryl. 689.
S. C. 1 B. & C. 485.

IV. Indictment for non-repair.

1. An indictment against a parish for not repairing a highway, cannot be quashed on an affidavit that the way was then in repair; but the defendant must plead guilty, and pay a nominal fine. *Rex* v. *Lincombe*, 2 Chit. 214.

2. After a verdict of not guilty on an indictment for not repairing a road, the Court will not grant a new trial. *Rex* v. *Burbon (Inhab.)*, 5 M. & S. 392.

V. Pleadings.

1. A plea to an action of trespass for breaking the plaintiff's close, that over and across, &c. was a common and public highway for, &c. *to pass along at pleasure, on payment of a certain toll*, is not inconsistent or contradictory; particularly, if not stated to be immemorial, for it may be a highway created by an Act of Parliament. *Sutcliffe* v. *Greenwood*, 8 Price 535.

HOLIDAYS.—See Post. tit. Officers.

HOUSEHOLDER.—See Post. tits. { Officers. Poor.

HUNDRED.

See the Statute 3 *Geo.* 4, c. 33.

And see Post. tit. RIOT.

1. An action on the statute 9 *Geo.* 1, c. 22, s. 7, must be brought against all the inhabitants at large, and does not lie against two only by name. *Jackson* v. *Pearson*, 2 Dow. & Ryl. 459. *S. C.* 1 B. & C. 304.

2. Hustings erected to take the poll at a contested election for members to serve in parliament. are not a *building* within the statute 57 *Geo.* 3, c. 19, s. 38;—therefore no action lies against the hundred for the destruction of such property by a tumultuous assembly. *Allen* v. *Ayre*, 3 Dow. & Ryl. 96.

IMPRESSMENT OF SEAMEN.

1. The statute 57 *Geo.* 3, c. 57, s. 6, declares that if any person liable to be arrested under any of the acts for the prevention of smuggling, shall be fit and able to serve on board a King's ship, any such person so arrested shall be taken before a Magistrate, and upon due proof be committed to prison to answer such information; and that it shall be left for the gaoler, &c. on the order of the Commissioners of Customs or Excise respectively directing the prosecution, to convey such person on board a ship of war, in order to his being impressed into his Majesty's naval service. Where, therefore, two seamen were impressed under the authority of that act, by virtue of an order signed by only four Commissioners of Customs, out of the nine nominated and appointed by the King's patent:—Held, that such order was valid and effectual, it appearing by the patent that four of the Commissioners might act for the whole body; and the Court refused to discharge such seamen out of custody. *White & Gibbs, Ex-parte.* 1 Dow. & Ryl. 151.

INCLOSURE ACTS.

CONSTRUCTION OF.

1. An Inclosure Act, authorizing Commissioners to make roads through inclosed lands, and declaring that the persons having common rights of such lands should be entitled to the herbage of the roads in such manner as the Commissioners should award, does not authorize them to sell the herbage by auction or otherwise, to one individual Commissioner. *Raimes* v. *Robinson*, 2 Chit. 501.

2. Where an Inclosure Act empowered the Commissioners to make a rate to defray the expenses of passing and executing the act; and provided that persons advancing money should be repaid out of the first money raised by the Commissioners; and expenses were incurred in the execution of the act before any rate was made; to defray which expenses the Commissioners drew drafts on their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account *as Commissioners*; and the bankers for six years continued to advance considerable sums by paying these drafts:—Held, that the Commissioners were personally responsible to the bankers for the drafts so made; and the latter, having from time to time made half-yearly rests in the account, and charged interest on the balance there struck; and the Commissioners having consented to that method of keeping the accounts:—Held, that this mode of charging interest half-yearly was not illegal or usurious. *Eaton* v. *Bell*, 5 B. & A. 34.

3. Where, under a local Inclosure Act, three Commissioners and their successors were nominated and appointed for setting out, dividing, allotting, and inclosing waste lands, according to rules prescribed thereby; and it was provided, that all acts or things done by any two of the Commissioners appointed or to be appointed by virtue of the act, should be as valid and effectual as if the same were done by all the said Commissioners; and it was further provided, that if any of them should die, or become incapable to act for the space of forty days, when occasion should require his or their attendance for carrying the act into execution, a new Commissioner or Commissioners should be elected and appointed in his or their stead:—Held, that an assessment made by two Commissioners, after the death of one of the three appointed by the act, and before the election or appointment of a successor, was invalid, although such assessment was made for the purpose of carrying the act into execution. *Doe d. Nicholson* v. *Middleton*, 6 Moore 532.
S. C. 3 Brod. & Bing. 214.

4. By the same act, the Commissioners were required to make a statement or account of all monies received, expended, or due to them, in the execution of such act; and to lay the same before a Magistrate, who was to examine and balance the same; and no charge or item in such account was to be binding, unless allowed by such Magistrate. *Quære*—Whether the Commissioners, having made an assessment for the costs of carrying the act into execution, could proceed for the recovery of such assessment before it was allowed by a Magistrate?
6 Moore 532.

5. But it was held that such clause does not take away an appeal given by a subsequent clause, "to the party grieved by any thing done in pursuance of that or the general Inclosure Act, (other than and except such determinations as were by that or the general Inclosure Act declared to be binding, final, and conclusive,") the allowance of the accounts by a Magistrate not falling within that exception. *Rex* v. *Cumberland (Justices)*, 1 B. & C. 64.

6. A *ditch* which from time immemorial has been the only boundary between a common and adjoining township; is a *fence* within the meaning of the general Inclosure Act, 41 *Geo.* 3, c. 109. Therefore, where the issue was, whether a certain allotment was bounded by a sufficient *fence* within the meaning of a local Inclosure Act, which required "that the allotments in lieu of tithes should be *inclosed and fenced* on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or *other sufficient fence*;" and the proof was, that part of the *locus in quo* was bounded by an old deep ditch:—Held, that this was a sufficient fence within the meaning of the statute. *Ellis* v. *Arnison*, 2 Dow. & Ryl. 161.
S. C. 1 B. & C. 70.

7. Where a private act for inclosing the waste lands of a manor reserved to the lord and his assigns, all mines, &c., together with all convenient *and* necessary ways, &c. then already made, or thereafter to be made; and liberty of laying waggon ways, &c., at his and their free will and pleasure; and to do all such other works, acts, and things, as might be necessary *or* convenient for the full and complete enjoyment thereof, in as full, ample, and beneficial a manner as if that act had not been made; and an action of trespass was brought against the assignee of the lord, for laying a waggon way over one of the allotments in an improper manner:—Held, that the real question for the Jury was, whether such waggon way had been laid in such a manner as a person of reasonable or ordinary skill would have laid it; and such as a prudent person would have adopted if he had been making the road over his own land, and not over that of another. *Abson* v. *Fenton*, 1 B. & C. 195.

8. Where, under an Inclosure Act, the tithes payable in respect of certain old inclosures were extinguished, and in lieu thereof a *corn rent* substituted, which was directed to be paid for ever afterwards to the impropriator and vicar, by the person who for the time being should be in the possession *or* occupation of the land, out of which the rent should be issuing; and a power of distress was given for the recovery thereof, the same as for rent service or other rent in arrear; and for several years part of such land remained uncultivated, untenanted, and wholly unprofitable to the owner, who during that time resided on another estate; and

he afterwards demised the land to another tenant, who entered and occupied, and brought it into cultivation:—Held, that during the time the land was unoccupied and uncultivated, the landlord was in the legal possession thereof within the meaning of the Act, so as to subject him to the payment of the corn rent in arrear; and that the tenant coming in under him was liable to be distrained upon for such payment. *Newling* v. *Pearce*, 2 Dow. & Ryl. 607. S. C. 1 B. & C. 437.

9. An Inclosure Act directed that the Commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, to the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the Commissioners were required to distinguish by their award the several allotments to such rectors and curate respectively, and *the same allotments* were thereby declared to be in full satisfaction and discharge of all tithes:—Held, that the tithes were not extinguished until the Commissioners had made their award. *Ellis* v. *Arnison*, 5 B. & A. 47.

10. Where, therefore, to an action of covenant for not setting out tithes of certain garden ground, the defendant pleaded the above Act, by which the plaintiff received an allotment of waste lands in the parish in lieu of tithe, but omitted to allege that the Commissioners under the act had made their award in pursuance thereof; and after a finding for the defendant by the Jury upon an issue of fact, the Court entered judgment for the plaintiff *non obstante veredicto*. *Ellis* v. *Arnison*, 3 Dow. & Ryl. 27.

11. A local Inclosure Act empowered the Commissioners, *with the concurrence and order of two Justices of the Peace, to stop up* and discontinue any of the roads or ways *in*, *through*, *over*, or *on the sides* of the inclosed lands. The general Inclosure Act, 41 *Geo.* 3, c. 109, s. 8, requires the Commissioners, first, to appoint and set out the *public carriage roads and highways*, and to describe them by metes and bounds in a map; of all which notice is to be given in a public newspaper, and a meeting is to be advertised, whereat any person aggrieved *by the setting out* of such carriage roads may attend and complain; and a Commissioner, or the Commissioners and two Magistrates, are to determine such complaints, and alter and finally confirm the map. It is then provided, (in the same section,) that *no old or accustomed road*, passing or leading *through* the old inclosures, which the Commissioner or Commissioners may be by any bill authorized to stop up, *shall be stopped up*, in any case, *without the concurrence and order of two Justices of Peace, acting, &c.; and such order shall be subject to an appeal to the Quarter Sessions.* By the 10th section of the general Act, the Commissioners are empowered to *set out* and appoint such *private roads, &c.* in, over, upon, *and through*, *or by the sides of* allotments, as they shall think fit, giving such notice. By the 11th section it is provided, that *all roadways, and paths, over, through, and upon such lands and grounds, which shall not be set out as aforesaid, shall be for ever stopped up and extinguished*, and shall be deemed and taken as part of the lands and grounds to be divided, allotted, and inclosed. The Commissioners published in a newspaper the roads set out, and also advertised the required meeting in such paper, announcing therein, that any person *injured or aggrieved* by the setting out such roads, or *by the omission of any other*, might attend, and they would be heard. After that meeting, the Commissioners and two Magistrates made and signed an order *confirming* the map, and the roads and footways, therein described, excepting three which were specified; and such map was annexed to the award. A proprietor of one of the new inclosures brought an action of trespass for breaking his close, &c.; the defendant justified under an alleged right of way, and proved an ancient footpath over the *locus in quo*. On a special case, stating that such old footpath *had been omitted by the Commissioners in preparing the map* of roads, &c. *set out*:—Held, that the old way was not stopped up and extinguished, according to the true construction of the Acts of Parliament, by what had been done by the Commissioners and Magistrates for that purpose, and with that intention; the positive concurrence and order of two Magistrates being indispensably necessary to the stopping up of roads, whether they were public carriage roads, *or private, or bridle and foot roads.* Nothing short of an order of the Magis-

trates, *expressly stopping up the road*, will satisfy the statute: merely *not setting it out*, is not sufficient to extinguish it, even in the case of a *private road, bridle, or footway*. *Harber* v. *Rand*, 9 Price 58.

11. By a clause in an Inclosure Act, a Commissioner was empowered to stop up any way, provided it was done by the order and with the concurrence of two Justices; and such order was to be subject to an appeal to the Quarter Sessions, in like manner, and under such form and restrictions as if the same had been originally made by such Justices: and by a subsequent clause, any party aggrieved might appeal at any time within six months next after the cause of complaint had arisen:—Under this act, the Commissioner, with the concurrence and order of two Justices, stopped up a road without giving the public notices required by the 55 *Geo.* 3, c. 68, s. 2:—Held, that a party aggrieved, might, under these circumstances, appeal at any time within six months. *Rex* v. *Townsend*, 5 B. & A. 420.

Quære—Whether it be necessary for a Commissioner to give such notices as are required by the General Act, where roads are stopped up under the provisions of a private or local Inclosure Act? 5 B. & A. 420.

INDICTMENT.

I. FELONY.

(*a*) *Forgery*.

1. Upon an indictment for forging and uttering a forged acceptance to a bill of exchange in payment for goods, which the prisoner had promised to pay for by an acceptance of a *London* banker, the bill was addressed to and purported to be accepted by *Messrs. Williams & Co.* Bankers, 3, *Birchin Lane, London*: and it was proved that *Messrs. Williams, Burgess, & Co.*, Bankers, of No. 20 in that Lane, had not accepted the bill: and that there were no other bankers of that name in *London*; but there was no evidence to shew that *Messrs. Williams & Co.*, of 3, *Birchin Lane*, had not done so:—Held, that this did not amount to a proof of forgery as against the prisoner. *Rex* v. *Watts*, 6 Moore 442. S. C. 3 Brod. & Bing. 197.

2. So, where upon an indictment for forging and uttering a forged acceptance, the bill was drawn by the prisoner, and addressed to "*Mr. T. B., Baize Manufacturer, Romford*," and purported to have been accepted by him, payable when due at "*No. 40, Castle Street, Holborn*;" and it was proved that no such person as *T. B.* ever resided at *Romford*, and that there was no *baize manufactory* there, and that he did not live at "*No. 40, Castle Street, Holborn*;" and the prisoner produced witnesses to shew that the acceptance was the handwriting of *T. B.*, but that he had never carried on the business of a *baize manufacturer* at *Romford*, nor resided at "*No. 40, Castle Street, Holborn*:"—Held, that although this was a case of gross fraud, it did not amount to forgery, as the acceptance was written by a person of the name of *T. B.* *Rex* v. *Webb*, 6 Moore 447. (*n.*) S. C. 3 Brod. & Bing. 228.

3. The forging and uttering a *Prussian* treasury note for the payment of one dollar, is within the statute 43 *Geo.* 3, c. 139, s. 1; and where the prisoner was convicted of forging an instrument (purporting to be such note) in a foreign language, but no count in the indictment contained an *English* translation of the note;—judgment was ordered to be arrested. *Rex* v. *Goldstein*,
3 Brod. & Bing. 201.

4. Where a prisoner forged the name of *J. C.* a co-trustee to a power of attorney for selling stock, which was standing in the joint names of the prisoner and *J. C.* in the bank of *England*: and the forgery was discovered before the stock was sold:—Held, that *J. C.* was a competent witness to prove that his name was forged. *Rex* v. *Wait*,
1 Bing. 121.

(*b*) *Embezzlement.*

1. A person employed as a journeyman miller, and in the habit of receiving money on his master's account, falls within the Embezzlement Act, 39 *Geo.* 3, c. 85. *Rex* v. *Barker*,
1 Dow. & Ryl. N.P.C. 19.

2. Where a defendant had established a saving-bank, consisting of one hundred and thirty members, each of whom paid a weekly subscription of 2*s.* 1*d.*, the odd penny being paid to the defendant for the trouble of managing the affairs of the bank, the funds of which were to be disposed of once a week by a lottery, consisting of one hundred and twenty-nine blanks, and one prize amounting to 13*l.*, which was to go to the holder of the fortunate ticket; and the defendant having absconded, after receiving from one of the subscribers deposits to the amount of 10*l.* 8*s.*, without receiving any benefit therefrom:—Held, that the defendant was not indictable under the 52 *Geo.* 3, c. 63, for embezzling the money as an "*agent*," or as a person having the possession of money for "*safe custody*:"—Held also, that as the defendant had never at any one time more than 2*s.* 1*d.* in her possession belonging to the prosecutrix, though she had received in the aggregate the whole sum of 10*l.* 8*s.*, the indictment charging her with receiving that sum generally, could not be supported. *Rex* v. *Mason*,
1 Dow. & Ryl. N.P.C. 22.

II. MISDEMEANOURS TO THE PERSON.

(*a*) *Conspiracy.*

See also *Rex* v. *Hilbers*, 2 Chit. 163.
Post. page 157.

1. Where two defendants were indicted for a conspiracy to commit a fraud, and one defended himself on the ground that he had himself been deceived by the representations of his co-defendant: and part of a written correspondence between both the defendants having been received in evidence for the Crown:—Held, that the whole of the correspondence between the defendants, up to the time of the overt act of the conspiracy, was admissible in evidence for the defence. *Rex* v. *Whitehead*,
1 Dow. & Ryl. N.P.C. 61.

III. MISDEMEANOURS TO PRIVATE PROPERTY.

(*a*) *Forcible Entry.*

1. An averment in an indictment for a forcible entry, that the prosecutor *was* "*seised*," is sufficient to found an application for a writ of restitution; and it need not be shewn by the prosecutor that he *still continued* to be seised. *Rex* v. *Dillon*, 2 Chit. 314.

IV. MISDEMEANOURS AGAINST PUBLIC JUSTICE.

(*a*) *Perjury.*

See also Post. tits. { PERJURY. VARIANCE.

1. Where an indictment for perjury averred, that the cause in which the alleged perjury was committed "came on to be tried, and was duly tried by a Jury of *the county*;" and the record of the trial stated that the Jury came of the neighbourhood *of Westminster*, instead of *at Westminster*:—Held to be no objection, as the cause was in fact so tried, and no county was mentioned in the record. *Rex* v. *Israel*,
3 Dow. & Ryl. 234.

V. MISDEMEANOURS AGAINST PUBLIC AND OTHER OFFICERS.

1. The statute 42 *Geo.* 3, c. 85, giving jurisdiction for trying and punish-

ing in this country persons holding public offices or employments, for offences committed abroad, does not extend to felonies. *Rex* v. *Shawe*, 5 M. & S. 403.

2. In an indictment against the defendant for refusing to serve the office of overseer of the poor of a parish:—Held, that he was a *substantial householder* within the statute 43 *Eliz.* c. 2, and liable to serve such office, although he occupied a house and paid the rent and taxes in the parish by means of a clerk only, but slept in another parish. *Rex* v. *Poynder*, 2 Dow. & Ryl. 258. *S. C.* 1 B. & C. 178.

And see *Rex* v. *Hall*, 2 Dow. & Ryl. 241. *S. C.* 1 B. & C. 123. Post. next page.

VI. MISDEMEANOURS AGAINST THE PUBLIC HEALTH, POLICE, OR ECONOMY.

1. Selling the dead body of a person capitally convicted, for dissection, where dissection is no part of the sentence, is a misdemeanour at common law; and in order to support an indictment for such offence it is not necessary that there should be direct evidence that the defendant had sold the body for lucre and gain, and for the purpose of being dissected. *Rex* v. *Cundick*, 1 Dow. & Ryl. N.P.C. 13.

VII. NUISANCES.

See also Ante. tits. { BRIDGES. HIGHWAYS. IV.

1. Keeping and maintaining a common gaming-house, and for lucre and gain, causing and procuring idle and evil disposed persons to come there to play together at "*Rouge et Noir*," and permitting such persons to play at such game for large sums of money, is indictable at common law; and it seems that an indictment for such an offence, merely charging the defendant with keeping a common gaming-house, would be good. *Rex* v. *Rogier*, 2 Dow. & Ryl. 431. *S. C.* 1 B. & C. 272.

VIII. FORM OF.

1. Where an indictment averred, "that one *E. L.* was publicly executed at, &c.; and that one *G. C.* of, &c., undertaker, *was retained and employed by W. W.* the keeper of the gaol in and for the county, to bury the body of the said person so executed, *for certain reward to be therefore paid* to the said *G. C.* by and on behalf of the said county; and in pursuance of the said *retainer and employment*, the body of the said person so executed was then and there delivered to the said *G. C.* for the purpose of being so by him buried as aforesaid; *and it then and there became the duty of the said G. C.* to bury the same accordingly, but that the said *G. C.* being, &c. and having no regard to his said duty, nor to, &c. *did not, nor would bury the said body*; but on the contrary thereof, unlawfully, &c., and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same for the purpose of being dissected, &c., to the great scandal, &c.":—Held, that the indictment was well framed, though apparently drawn in the language of a declaration in *assumpsit*. *Rex* v. *Cundick*, 1 Dow. & Ryl. N.P.C. 13.

IX. PRACTICE RELATIVE TO.

See Ante. tit. CERTIORARI, *passim*.
Post. tit. VENUE.

See also *Rex* v. *Clark*, 1 Dow. & Ryl. 43. Ante, page 2.
Rex v. *Cotesbatch*, 2 Dow. & Ryl. 265. Ante. page 38.
Rex v. *Fielder*, 2 Dow. & Ryl. 46. Post. tit. NEW TRIAL.

1. The Court will remove an indictment for a misdemeanour from *Lancashire* to *Yorkshire*, if there is reasonable cause to apprehend or suspect that justice will not be impartially administered in the former county. *Rex* v. *Hunt*, 2 Chit. 130.

2. If the counsel for the defendant on an indictment for a misdemeanour opens new facts in his address to the Jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is notwithstanding, entitled to a general reply. *Rex* v. *Bignold*, 1 Dow. & Ryl. N.P.C. 59.

INFANT.

I. PRIVILEGES, INCAPACITIES, DUTIES, AND RESPONSIBILITIES OF.

See also tit. COSTS, IX. 12, 13. Ante, page 89.

1. Where *A.* and *B.*, tutors dative appointed by a *Scotch* Court as guardians of an infant, executed for and on his behalf a tack or agreement, *inter partes*, for a lease, whereby a salmon fishery in *Scotland* was demised to *C.* for four years, at a certain rent, covenanted to be paid to the infant:—Held, that he might maintain an action of debt in his own name upon the agreement, to recover arrears of rent, though he was no party to the agreement, nor proved to be of full age at the time the action was brought. *Carnegie* v. *Waugh*, 2 Dow. & Ryl. 277.

2. An infant cannot be appointed to the office of clerk of a Court of *Requests*, where it is part of the duty of that office for such clerk to receive the money of the suitors; as it is in the nature of an office of a public trust. *Claridge* v. *Evelyn*. 5 B. & A. 81.

3. Where an infant held himself out to the world as being in partnership with *J. S.*, and continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-on :—Held, that it was his duty to give notice of his disaffirmance of the partnership on his arriving at age; and as he had neglected to do so, that he was responsible to persons who had trusted *J. S.* with goods subsequently to the infant's attaining twenty-one, on the credit of the partnership. *Goode* v. *Harrison*, *(in error)*, 5 B. & A. 117.

II. APPEARANCE BY.

1. Where there had been judgment of nonsuit in an action brought against an infant, it is no ground of error that he had appeared by attorney. *Bird* v. *Pegg*, 5 B. & A. 418.

III. GUARDIAN, HOW APPOINTED.

1. Where an infant's father, being a necessary witness on his behalf, could not be appointed his *prochein amy* in the conduct of a suit,—the Court will, on motion, appoint some other person as guardian, with the consent of the father. *Claridge* v. *Crawford*, 1 Dow. & Ryl. 13.

INFERIOR COURT.

See Ante, tits. CERTIORARI, I. 3, 7. page 74. COSTS, I. (*d*), page 84. FOREIGN ATTACHMENT.
Post. tit. PROCEDENDO.

1. The general Court of *Requests* Act, 23 *Geo.* 3, c. 38, s. 8, declares, that no person shall be capable of acting as a Commissioner in the execution of any of the Acts for constituting such Courts, unless such person shall be a *householder* within the county, &c. for which he shall act. The word *householder*, does not mean a personally resident housekeeper;—and therefore, where a person had been elected to the office of registrar and clerk of the Court of *Requests* of the city of *Bristol*, by a majority of householders, paying rent, rates, and taxes, and resident by their partners in trade or their servants only:—Held, that the election was valid. *Rex* v. *Hall*, 2 Dow. & Ryl. 241. *S. C.* 1 B. & C. 123.

And see *Rex* v. *Poynder*, 2 Dow. & Ryl. 258. *S. C.* 1 B. & C. 178. Ante. last page.

2. *Assumpsit* for use and occupation is a cause of action within the jurisdiction of the *Bath* Court of *Requests*; and a defendant occupying a warehouse,

though he does not personally reside in that city, is entitled to be sued within the local jurisdiction for a debt under 10*l*. arising out of the limits thereof. *Axon* v. *Dallimore*, 3 Dow. & Ryl. 51.

3. Where the plaintiff declared in *assumpsit* for work and labour in healing horses within the jurisdiction of a County Court, and for potions, &c. administered on those occasions:—Held, that this amounted to a sufficient allegation that the potions were administered within the jurisdiction of such County Court. *Dunn* v. *Crump*, 3 Brod. & Bing. 309.

4. On the removal of a cause by *habeas corpus* from an inferior to a superior Court, if the plaintiff declares *de novo*, he is not bound to declare in the same form of action as in the inferior Court. *Bowerbank* v. *Walker*, 2 Chit. 517.

5. Where, in an action of debt in the *Palace Court*, the defendant having suffered judgment by default, that Court refused to allow the plaintiff to sign final judgment, as by law it was contended he might do:—The Court of *King's Bench* refused a *mandamus* to compel the inferior Court to allow final judgment to be signed, leaving the plaintiff to his remedy by writ of error, where he had taken the necessary steps for that purpose. *Rex* v. *Conyngham (Marquis)*, 1 Dow. & Ryl. 529.

S. C. nomine Arden v. *Connell*, 5 B. & A. 885.

INFORMATION.

I. ON WHOSE APPLICATION, AND HOW OBTAINED.

See Post. tits. { JUSTICES OF PEACE. LIBEL. PERJURY.

1. An affidavit to found a motion for a criminal information must distinctly negative the charge; and it is usual to do so in the words of the charge. *Rex* v. *Wright*, 2 Chit. 162.

2. And on a motion for such information against two persons for a conspiracy in endeavouring to raise the price of oil, it must appear distinctly that they combined together, as it is no offence for an individual separately so to endeavour. *Rex* v. *Hilbers*, 2 Chit. 163.

II. PRACTICE RELATIVE TO.

1. The Court of *Exchequer* will remove an action brought in another Court against an officer of excise for refusing to accept the duty on goods warehoused, and to grant the usual certificate, where part of the goods having been afterwards seized, an information for their condemnation is depending in the former Court, and the trial of the action removed was ordered to await the result of the trial of the information. *Beningfield* v. *Stratford*, 8 Price 584.

INNKEEPER.

1. It seems that an hotel-keeper is subject to the same liabilities as an innkeeper; but he should be declared against in the latter capacity. *Jones* v. *Osborn*, 2 Chit. 484.

2. But an innkeeper, as such, is not a trader under the bankrupt laws; neither is an innkeeper, selling wine and brandy, and other liquors, by the dozen, to customers out of his inn, necessarily a trader. *Willett* v. *Thomas*, 2 Chit. 651.

INQUIRY, WRIT OF.

WHEN NECESSARY, AND HOW EXECUTED.

See also tit. DAMAGES, Ante, page 96.

1. In an action of debt for use and occupation after judgment by default, it seems that a writ of inquiry is necessary before final judgment is signed. *Arden* v. *Connell*, 5 B. & A. 885.

2. The Court granted a rule for delivering up mortgage deeds on payment of the debt, interest, and costs, in an action of covenant. *Anonymous*, 2 Chit. 264.

3. So, on a judgment by default in covenant for the arrears of an annuity, the Court granted a rule for reference to the Master to compute arrears. *Allwoway* v. *Hill*, 2 Chit. 32.

4. But the Court of C. P. would not allow it to be referred to the Prothonotary to take an account of monies received by the lessor of the plaintiff in respect of annuities, or to ascertain the costs in an action of ejectment. *Doe* d. *Johnson* v. *Roe*, 6 Moore 331.

5. The plaintiff may obtain a rule *nisi* to refer a bill of exchange to the Master on the same day interlocutory judgment is signed for not producing the record. *Russen* v. *Hayward*, 1 Dow. & Ryl. 444. *S. C.* 5 B. & A. 752.

6. It is no cause against a rule for referring a bill of exchange to the Master to compute principal and interest, that the judgment signed was irregular, on the ground that such irregularity must be the subject of a counter motion to set aside the judgment. *Marryat* v. *Winkfield*, 2 Chit. 119.

7. The Court will not grant a rule to compute interest on a judgment in an action upon a bill of exchange. *Bishop* v. *Best*, 2 Chit. 233.

8. A plaintiff may issue a writ of inquiry in the ordinary form, in an action of debt for the treble value of tithes. *Bale* v. *Hodgetts*, 1 Bing. 182.

9. It seems that a notice of executing a writ of inquiry in the *King's Bench* can be continued or countermanded but once; that Court concurring with the Court of C. P. as to the practice in this respect. But where several notices and countermands of inquiry had been served, and eventually, a fresh, and not a continuing notice was served:—Held, that the inquisition under it was regular. *Burgess* v. *Royle*, 2 Chit. 220.

10. In the Court of *Exchequer*, notices of execution of writs of inquiry must be given by attornies and clerks in Court, and be entered in the book of orders; and notices of such entries must be left on the seats of clerks in Court. *Reg. Gen.* H. T. 39 *Geo.* 3, 8 Price 503.

11. And eight days' notice must be given of the execution of such writs, except where the *venue* is laid in *London* or *Middlesex*, and the defendants reside above forty miles therefrom; and in these excepted cases, fourteen days' notice must be given. *Reg. Gen.* H. T. 39 *Geo.* 3, 8 Price 504.

INQUISITION.

WHEN SET ASIDE.

See *Clement* v. *Lewis (in error)* 3 Brod. & Bing. 297. Ante. page 96.

1. A motion to set aside an inquisition for excessive damages must be made on affidavits, which must be produced at the time the rule is granted. Therefore, where such a motion was made on the last day of Term, without an affidavit, and the rule was afterwards drawn up on an affidavit sworn before a Judge in vacation, the Court in the following Term discharged the rule with costs. *Williams* v. *Reeves*, 2 Chit. 218.

2. The Court of *Exchequer* received explanatory affidavits of two of the Jury, on an application to set aside an inquisition, on the ground of their having improperly allowed interest *Milsom* v. *Hayward*, 9 Price 134.

INSOLVENT DEBTORS.

I. COMPOSITION WITH CREDITORS.

See *Catherwood* v. *Chaband*, 2 Dow. & Ryl. 271. *S. C.* 1 B. & C. 150. Ante. page 136.

1. A composition deed, by which a tradesman assigned all his effects in trust for the benefit of his creditors, recited that he was indebted to his landlord in a specific sum for rent;—to the Crown in a certain sum for excise duties,—and to *A.* and *B.* by name, as judgment creditors in a sum of 400*l.*; and then recited, that one of the trusts was to pay these specific demands, and all debts under 10*l.* in full. Then followed a proviso for avoiding the deed: that "if any of the creditor or creditors whose respective debts should amount to 100*l.* or upwards, or any two creditors whose debts should amount to 150*l.* or upwards, should not duly execute the deed within three calendar months from the date thereof; or in case any commission of bankruptcy should in the mean time be awarded, the deed should be void." *A.* and *B.* whose judgment debt was to be paid in full, having refused to execute the deed upon request, one of the general creditors, who had executed, brought an action to recover the amount of his demand against the debtor:—Held, that the deed was a bar to the action; and that the execution by *A.* and *B.* was not necessary to render it valid. *Wells* v. *Greenhill*,

1 Dow. & Ryl. 493. *S. C.* 5 B. & A. 869.

2. A covenant in an indenture, (by which a debtor assigned his effects to trustees for the benefit of creditors,) not to sue, if the trustees fairly accounted for the effects, does not operate as a release of the creditor's debts, if the trustees refuse to account. *Kesterton* v. *Sabery*, 2 Chit. 541.

3. In an action against a trustee under a composition deed between the defendant *A. B.* and his creditors for the amount of the plaintiff's (a creditor's) dividends, (the deed reciting, that the debtor was indebted to the several creditors whose debts were set opposite their names in the schedule annexed to the deed, which covenanted to pay a specific *ratio* of the debts,) it is no defence to say that the plaintiff did not set the amount of his debt opposite to his name in the schedule:—It is sufficient to render the defendant liable, that he had notice of the amount of the plaintiff's claim before action. *Daniel* v. *Saunders*, 2 Chit. 564.

4. A condition in a deed of composition, that a publican shall continue to deal for twelve years with his creditors in the articles of their respective trades, may be valid:—but it is qualified by the implied condition, that such articles shall be good and of a marketable quality. *Thornton* v. *Sherratt*,

8 Taunt. 529.

5. After a creditor had signed a composition deed in favour of his debtor, but afterwards induced the latter to give him bills of exchange for the full amount of his debt, dated the day before the composition deed; and, after receiving one instalment, sued the debtor upon the bills and recovered the amount, *minus* the instalment paid:—Held, that the debtor might maintain an action for money had and received against his creditor, to recover the difference between the amount of the composition and the full amount of the debt. *Turner* v. *Hoole*,

1 Dow. & Ryl. N.P.C. 27.

II. ASSIGNEE, APPOINTMENT, DUTY, AND LIABILITY OF.

1. Where an assignee was appointed under the statute 16 *Geo.* 2, c. 17, to dispose of the estate and effects of an insolvent, who took the benefit of the act in the year in which that sta-

tute was passed; and the assignee was removed and another appointed under a rule of the Court of C. P.; and a succession of removals and new appointments took place under rules of that Court, until 1779; when *A.* was also made assignee of the insolvent estate under a rule of that Court and obtained possession of the insolvent's estate, and disposed of some parts of it, and died without distributing the same, or giving any account thereof, leaving *B.* his heir and representative him surviving; and the personal representative of the insolvent (who had been dead some years,) applied to the Court for a rule, calling on *B.* to shew cause why a new assignee should not be appointed; and an account taken before the Prothonotary, of all sums received by *A.* in his lifetime, or by *B.* since his decease, belonging to the insolvent's estate:—The Court rejected the application, on account of the length of time which had been suffered to elapse previously to its being made. *Ex-parte Heathfield,* 8 Taunt. 403.

2. A plaintiff suing as assignee of an insolvent, if nonsuited, must pay the defendant's costs. *Andrews* v. *Sealy,* 8 Price 212.

And see *Wansborough* v. *Dyer,* 2 Chit. 40. Ante, page 40.

III. DISCHARGE, WHO ENTITLED TO, AND HOW OBTAINED.

1. To prevent unnecessary expense to plaintiffs suing in the Courts of *King's Bench* and *Common Pleas,* in case of notice given by prisoners of their intention to apply for their discharge under any act made for the relief of Insolvent Debtors:—it was ordered:—that after such notice given to any plaintiff, no prisoner should be superseded, or discharged out of custody, at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of those Courts, from the time of such notice given, until some rule or order should be made in the cause in that behalf by such Courts, or one of the Judges thereof:—and that a copy of this rule should be hung up in the *King's Bench* prison, the *Fleet* prison, the chambers of the Judges, and in the Prothonotaries' office, in the places where rules of Court are usually hung up. *Reg. Gen. K. B.* E. T. 3 *Geo.* 4. 1 Dow. & Ryl. 472. 5 B. & A. 799. 2 Chit. 377. *C. P.* M. T. 3 *Geo.* 4. 1 Bing. 120.

2. An insolvent is entitled to be discharged, though he has proceeded irregularly, if he makes an affidavit that such irregularity was produced through ignorance. *In re Jones,* 2 Chit. 226.

3. And an insolvent may be discharged under the Lords' Act, although he has been remanded by the Commissioners of the Insolvent Debtors' Court, for misconduct towards the creditor at whose suit he was charged in execution. *Austin* v. *Hankin,* 6 Moore 573.

4. If a defendant be arrested for a sum under 20*l.*, and defend the action until the debt and costs amount to nearly 100*l.*, and afterwards give a warrant of attorney for the amount of the original debt and such costs, under which judgment was entered up, and he was taken in execution:—Held, that he was not entitled to his discharge under the 48 *Geo.* 3, c. 123, although he had laid in prison more than twelve months, as the warrant of attorney did not appear to have been improperly obtained from him, nor was he in custody at the time it was given. *Robinson* v. *Sundell,* 6 Moore 287.

5. A married woman in execution with her husband, for a debt contracted by her before her coverture, is not entitled to be discharged under the statute 1 *Geo.* 4, c. 119, as she is not capable of executing a warrant of attorney, and complying with the other terms required by the 25th section of that statute. *Ex-parte Deacon,* 5 B. & A. 759.

And see *Chalk* v. *Deacon,* 6 Moore 128. Ante, page 61.

6. And the course of proceeding on the part of an insolvent debtor of the Crown, in prison under an extent, for the purpose of obtaining his discharge, under the 41st section of that statute, is by *supersedeas quoad corpus. Rex* v. *Austen. Same* v. *Lewis,* 9 Price 142.

7. The Court of *Exchequer* is not bound by the general provisions of that act, in respect of insolvents applying to the Court of Insolvent Debtors, or to the Quarter Sessions, for their discharge out of custody. 9 Price 142.

8. And the 41st section of the statute

has given the Barons of the *Exchequer* an independent and discretionary power to discharge insolvent Crown debtors, on an investigation of the whole case.
9 Price 142.

IV. WHEN AND HOW BROUGHT INTO COURT.

1. A Commissioner of the Insolvent Debtors' Court is empowered to have insolvent debtors brought before him, by a rule or order of, and signed "by the Court;" but not if signed by the Commissioner. *Anonymous*, 2 Chit. 225.

And see *Whitelegg* v. *Richards*, 6 Moore 501. *S. C.* 3 Brod. & Bing. 188. Post. next page.

2. By the Lords' Act, 32 *Geo.* 2, c. 28, ss. 16 & 17, "creditors intending to bring up an insolvent, to compel him to make an assignment of his estate and effects under the compulsory clauses, must give twenty days' notice to every other creditor at whose suit the prisoner is detained, *if he can be met with*; and if not, then to the attornies who were *last* employed in the suits in which they detained the prisoner:"—Held, that service of such notice upon the clerk of an insolvent's creditor in one instance, and upon the attorney of a creditor in another, without shewing that he was the attorney *last* employed in the suit, is sufficient. *Chapple* v. *Ashley*,
1 Dow. & Ryl. 394.
S. C. 5 B. & A. 749.

3. By the Lords' Act, 33 *Geo.* 3, c. 5, s. 5, where any debtor who neglects to take the benefit thereof within the time limited, shall make it appear that such neglect arose from ignorance or mistake, he shall be entitled to take the benefit of the act, as if he had taken the same within the time limited:—But where an insolvent delayed his petition beyond the time limited, in expectation of being discharged by a commission of bankruptcy:—Held, that he was not entitled to relief on the ground of ignorance or mistake. *Druce* v. *King*,
1 Dow. & Ryl. 539.

4. A prisoner in execution, at the suit of a creditor, whose debt exceeds 300*l.*, is not liable to be brought up under the compulsory clause in the Lords' Act, 33 *Geo.* 3, c. 5, to make an assignment of his estate and effects. *Barker* v. *Slater*, 2 Dow. & Ryl. 165.

5. But where a person is in execution for a particular debt under 300*l.*, he is liable to be brought up under that clause, at the instance of a particular creditor; although the aggregate of the debts for which he is in execution exceeds that sum. *Chapple* v. *Ashley*,
5 B. & A. 537.
S. C. 1 Dow. & Ryl. 25.

V. ALLOWANCE TO, HOW MADE.

See *Burton* v. *Issitt*, 5 B. & A. 267.
Post. tit. PRISONER.

1. It is no objection to a note given to an insolvent debtor, that it is not entitled in the Court. *Clarke* v. *Davis*,
2 Chit. 226.

VI. PRIVILEGE AND LIABILITY OF AFTER DISCHARGE.

1. A debt depending upon a contingency, at the time of a party's discharge under the Insolvent Act, 18 *Geo.* 3, c. 52, is not thereby discharged. *Hutton* v. *Worrall*, 2 Chit. 448.

N. B. *That statute has now expired.*

2. The discharge of a person under the Insolvent Debtors' Act, 53 *Geo.* 3, c. 102, does not bar an action of trespass where the cause of action arose before the insolvent went to prison, and the damages were unliquidated before his discharge. *Lloyd* v. *Neele*,
2 Chit. 222.

3. The Court of *Exchequer* refused to set aside an execution against the goods of a person, who, having been discharged under an Insolvent Debtors' Act, gave a note to the plaintiff, (his creditor,) for that part of the debt which was not paid under the assignment;—as where the remedy is taken away, and not the debt, the latter may still be the ground of a future promise or security. *Best* v. *Barker*, 8 Price 533. *n.*

4. Where a defendant was discharged under the statute 1 *Geo.* 4, c. 119, pending an action against him, and an execution was afterwards sued out against his goods on a judgment recovered in such action:—The Court of *Exchequer* ordered it to be set aside with costs, and the money levied under it to be restored to the defendant. *Darley* v. *Brown*, 8 Price 607.

VII. WHAT PROPERTY PASSES TO CREDITORS.

See *Chapple* v. *Ashley*, 1 Dow. & Ryl. 25. *S. C.* 5 B. & A. 537. *suprà.*

1. Manure is assignable by the tenant

of a farm, though he thereby subjects himself to an action for bad husbandry. *Burbage* v. *King*, 2 Chit. 246.

VIII. PLEADINGS.

See *Catherwood* v. *Chaband*, 2 Dow. & Ryl. 271. *S. C.* 1 B. & C. 150. Ante, page 136.

1. Where, in an action on the case against an officer of the Insolvent Debtors' Court, for improperly drawing up an order for the discharge of an insolvent, instead of his further imprisonment, the declaration alleged, that such officer, *wrongfully*, falsely, and unlawfully made and issued a certain order, purporting to be an order from the Court:—Held, on general demurrer, that as it was throughout the declaration averred as purporting to be, and treated as an order, and had not been repudiated or rescinded by the Court itself, the action could not be maintained by a creditor of the insolvent against the officer, for the discharge of the former out of custody, under such order. *Whitelegg* v. *Richards*, 6 Moore 501. *S. C.* 3 Brod. & Bing. 188.

2. But a writ of error having been brought on this judgment in the Court of *King's Bench*:—Held, that the supposed order of the Insolvent Debtors' Court was not to be understood as the order of that Court until set aside; and that the declaration was not demurrable for not averring that the supposed order was, in fact, set aside. *Whitelegg* v. *Richards* (*in error*), 3 Dow. & Ryl. 237. *S. C.* 2 B. & C. 45.

INSPECTION AND PRODUCTION OF DEEDS AND PUBLIC INSTRUMENTS.

See *Orr* v. *Morice*, 6 Moore 347. *S. C.* 3 Brod. & Bing. 139. Ante, page 126.

1. Where the plaintiff in an action on a deed has had it taken from him under a warrant against him for felony; the Court will, upon an affidavit of demand upon the magistrate and constable, who granted and served the warrant, direct them to give the plaintiff a copy to declare upon, and to produce the deed at the trial, on the plaintiff's undertaking to pay the expenses. *Harris* v. *Aldrit*, 2 Chit. 229.

2. The Court made a rule absolute for inspecting a lease, to obtain the names of the witnesses, in order to *subpœna* them. *Anonymous*, 2 Chit. 230.

3. But they will confine their order for the inspection of a deed to particular parts of it. *Ramsbottom* v. *Cooper*, 2 Chit. 231.

4. The Court will not compel a party to allow the inspection of his title deeds, and give a copy thereof to a person who supposes that such deeds contain a reservation in his favour of manorial rights; unless it appears that the party holds the deed as trustee for the applicant. *Pickering* v. *Noyes*, 2 Dow. & Ryl. 386. *S. C.* 1 B. & C. 262.

5. Nor will they compel the plaintiff to deliver to the defendant a copy of an agreement, in order to enable the latter to plead in abatement that the agreement was signed jointly by himself and others. *Beale* v. *Bird*, 2 Dow. & Ryl. 419.

6. On an issue as to the liability of defendants as partners, an attorney *subpœnaed* to produce a composition deed, executed between them and another firm, shewing the partnership, may object to the production of the instrument, on the ground that the disclosure of its contents may prejudice the latter in disputes with other persons. *Harris* v. *Hill*, 1 Dow. & Ryl. N.P.C. 17.

7. A rule for an inhabitant of a parish to inspect the parish books, may be absolute in the first instance. *Anonymous*, 2 Chit. 290.

8. But a parishioner has no right to inspect parish books for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish; and the Court refused to grant a *mandamus* for that purpose. *Rex* v. *Smallpiece*, 2 Chit. 288.

9. Where the plaintiff entered into a contract with an auctioneer for the purchase of land by auction, and made a deposit in part payment of the purchase-money, and afterwards brought an action

against the defendants (the vendors) for interest, for not completing the purchase according to the conditions of sale:—Held, that the latter must produce such contract for the purpose of the plaintiff's inspecting it, or getting it stamped. *Gigner* v. *Bayly*, 5 Moore 71.

10. Where the plaintiff, in an action on bills of exchange, made an affidavit that they had got into the defendant's possession by fraud, and had never been satisfied; and obtained a rule *nisi* for the defendant to produce them, and permit the plaintiff to take copies; and the defendant denied the fraud and non-payment by affidavit:—the rule for their production was discharged. *Threlfall* v. *Webster*, 1 Bing. 161.

INSURANCE.

I. SHIP.

(*a*) *Seaworthiness.*

1. Where a ship sailed on her outward voyage from *Liverpool* to *Cuba*, with a crew of thirteen men; and on her arrival at the latter place, three had died and two deserted there, and the captain could only procure eight men for the whole of the homeward voyage, and two for *Montego Bay* in *Jamaica*, (ten men being a competent crew to navigate the vessel;) and he accordingly touched at *Montego Bay* for the sole purpose of landing those two men and procuring others in their stead, which he did; and the vessel was lost by the perils of the sea in proceeding from thence on the voyage to *Liverpool*:—Held, that on a policy from *Cuba* to *Liverpool*, the ship was not seaworthy as to her crew for the whole of her homeward voyage when she sailed from *Cuba*; or that even if she then had a sufficient crew, the touching at *Montego Bay* was a deviation; and that the circumstance of her having become seaworthy by having a sufficient crew at the time of the loss, did not entitle the assured to recover as against an underwriter on the policy. *Forshaw* v. *Chabert*, 6 Moore 369. *S. C.* 3 Brod. & Bing. 158.

(*b*) *Employment and Conduct of.*

See also Post. Div. VI. (*a*) page 165.

1. Where ship, freight, and passage-money were insured for 13,000*l.*, at and from *London* to the *East Indies* and back; and the ship sailed seaworthy from *Ca-*

cutta on her homeward voyage, and afterwards received considerable damage by stormy weather, so as to render it necessary for the captain to put back there; and immediately on his arrival, he gave notice of abandonment to the agents for *Lloyd's* resident there, and desired that their surveyor might be present at the surveys of the ship; and the agents replied, that they had no authority to accept abandonments; and after three several surveys of the ship by competent persons, at two of which the surveyor for the agents attended, and it was found that the expense of repairing her would be from 4000*l.* to 5000*l.*; and the captain having ineffectually attempted to raise money by hypothecation of the ship, (having no funds to repair her himself,) sold her for 1200*l.*; and the Jury found that what had been done by him was for the benefit of all concerned, and gave a verdict for the assured as for a total loss:—Held, that under the circumstances, the sale was justifiable; and the Court refused to grant a new trial. *Read* v. *Bonham*, 6 Moore 397. *S. C.* 3 Brod. & Bing. 147.

II. VOYAGE.

(*a*) *Deviation.*

See *Forshaw* v. *Chabert*, 6 Moore 369. *S. C.* 3 Brod. & Bing. 158. Ante, last page.

1. Where a ship was insured at and from *Hull* to her port or ports of loading in the *Baltic Sea* and *Gulph of Finland*, with liberty for her to proceed and sail to, and touch and stay at any ports or places whatsoever, for all purposes, particularly at *Elsinore*, without being deemed a deviation; and she touched and stayed at *Elsinore* and *Dantzic* to deliver goods, *Pillau* being her port of loading:—Held that this was a deviation. *Solly* v. *Whitmore*, 5 B. & A. 45.

III. RISKS.

(*a*) *Insured against by Policy.*

1. On a policy on ship, in the usual form, for twelve months, at sea and in port, the declaration averred a loss as follows:—that the ship having arrived at the harbour of *St. John*, in the province of *New Brunswick*, and discharged her cargo there, it became necessary to place her, and she was accordingly placed, in a graving-dock there to be repaired, and near to a certain wharf in the graving-dock; and that whilst there, she was, by the violence of the wind and weather, blown over on her side, whereby she struck the ground with great violence and was bilged, and greatly injured and damaged:—Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the ship," for which the underwriters were liable. *Phillips* v. *Barber*, 5 B. & A. 161.

(*b*) *Excluded by Memorandum.*

1. Where, during the course of a voyage on an inland canal, it became necessary, in order to repair the canal, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, took the ground by accident on some piles which were not previously known to be there:—Held, that this was a stranding within the usual memorandum in the policy, the accident not having happened in the ordinary course of the voyage. *Rayner* v. *Godmond*, 5 B. & A. 225.

(*c*) *Inception and Duration of, on Freight.*

See *Palmer* v. *Blackburn*, 1 Bing. 61. Post. page 166.

1. Where the owner of a vessel entered into a contract with the *East India* Company at *Madras*, through the medium of a correspondence with their agents; for freight, and the passage of invalids: and the ship having been surveyed by their officer, and represented to be fit for the purpose, after certain alterations had been made; and goods had been shipped, water taken in for the invalids, and the projected alterations commenced; but the completion was prevented by the perils of the sea:—Held, in an action on a policy on freight and passage-money, that there was an inception of the risk; and that the plaintiff was entitled to recover for passage-money as well as freight:—Held also, that a contract for such a purpose need not be by charter-party, nor precise or definite in its terms *Truscott* v. *Christie*, 5 Moore 33.

IV. POLICY.

(*a*) *Alteration.*

1. On a policy of assurance on ship and goods "at and from *Cuba* to *Liverpool*, with liberty in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever; and with leave to discharge and take in at any ports or places she might call at, without prejudice to that insurance;" the assured, after the subscription of the policy, inserted in the body of it the words "with leave to call off *Jamaica*," which was acquiesced in by all the underwriters except the defendant, without increase of premium:—Held, that this was a material alteration, and avoided the policy as against the defendant. *Forshaw* v. *Chabert*, 6 Moore 369. S. C. 3 Brod. & Bing. 158.

V. CONCEALMENT.

(*a*) *When material.*

1. Underwriters are not entitled to notice of the part of a ship where goods are stowed, whether on deck or otherwise, although the goods put on board were cases of oil of vitriol, and different freight was payable, according to the particular part of the ship in which they might be stowed. *Dacosta* v. *Edmunds*, 2 Chit. 227.

2. Where, on an insurance on goods from *London* to *Jamaica* generally, the goods insured were destined to a particular plantation in that island; and the usual course in such a case was for the ship to proceed to an adjoining port, and there tranship her cargo into shallops; but no communication of this fact was given to the underwriters:—Held, that they were still liable for a loss which occurred after such transhipment on board the shallops. *Stewart* v. *Bell*, 5 B. & A. 238.

VI. LOSS.

(*a*) *By Perils of the Sea.*

1. The underwriters on a policy are liable for a loss arising immediately from perils of the sea, such as the winds and waves; although remotely, from the mismanagement and negligence of the master and mariners. *Walker* v. *Maitland*, 5 B. & A. 171.

2. Where a policy was effected on mules and other living animals, warranted "free from mortality and jettison;" and in the course of the voyage some of them were killed, in consequence of the agitation of the ship in a storm; and others died before the termination of the voyage insured, in consequence of the injuries they had received:—Held, that this was a loss by a peril of the sea, for which the underwriters were liable. *Lawrence* v. *Aberdein*, 5 B. & A. 107.

3. Where, in an action on a policy on ship in the usual form, for twelve months, at sea and in port; the ship having arrived at the harbour of *St. J.* and discharged her cargo, it became necessary to place her, and she was accordingly placed in a graving-dock there to be repaired, and near to a certain wharf in the graving-dock; and whilst there, she was, by the violence of the wind and weather, thrown over on her side, whereby she struck the ground with great violence, and was bilged:—Held, that these facts, although coupled with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount to a loss by perils of the sea. *Phillips* v. *Barber*, 5 B. & A. 161.

4. On a policy upon goods, where the ship was disabled from pursuing her voyage by perils of the sea, and obliged to put into port to be repaired; the master, having no other means of raising money to defray the expenses of such repairs, sold part of the goods, and applied the proceeds in payment of these expenses:—Held, that the underwriter was not answerable for the loss. *Powell* v. *Gudgeon*, 5 M. & S. 431.

5. So, where a vessel was driven by tempestuous weather into a foreign port, and in order to defray the expenses of repairing, (without which she could not have proceeded on her voyage,) the captain was obliged to sell part of the cargo:—Held, that the underwriters were not liable for a total loss by perils of the sea. *Sarquy* v. *Hobson*, 3 Dow. & Ryl. 192. S. C. 2 B. & C. 7.

6. On a policy upon goods in the common form, where the ship and goods were sunk at sea by another ship's firing upon her, in consequence of mistaking her for an enemy:—Held, that the in-

sured were entitled to recover on a special count, stating the particular circumstances; as it fell within the general words of the policy, "all other perils, losses," &c. But it seems that such a loss is not a loss by a peril of the sea. *Cullen* v. *Butler*, 5 M. & S. 461.

(*b*) *By Barratry.*

1. Where a ship and cargo were carried barratrously by the master out of the course of the voyage, and the ship and part of the cargo were sold, and the remainder sent home by a strange ship:—Held, that this was a total loss of the cargo from the time of committing the act of barratry; and that the underwriters were liable for such loss, with benefit of salvage only. *Dixon* v. *Reid*, 1 Dow. & Ryl. 207. *S. C.* 5 B. & A. 597.

*2. Where the captain, in the due course of his voyage, put into port for the purpose of repairing damage; and whilst the repairs were proceeding, was absent, and continued so for a much longer time than was necessary to finish such repairs; and during his absence procured forged papers, and afterwards returned to the vessel; and, instead of proceeding on the voyage, carried her to a foreign port; and the Jury found that an act of barratry was committed during the absence of the captain, and whilst the vessel was being repaired:—Held, that they were warranted in so doing; and that their verdict could not be disturbed. *Roscow* v. *Corson*, 8 Taunt. 684.

(*c*) *By Average Contributions.*

1. The general principle that the assured shall recover no more than an indemnity in case of loss, may be controlled by a mercantile usage clearly established to the contrary:—Therefore an usage, that the loss in an open policy and freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage. *Palmer* v. *Blackburn*, 1 Bing. 61.

VII. ABANDONMENT.

(*a*) *Where necessary, and at what time allowed.*

1. Barratry of the master is a ground of abandonment as for a total loss, though the goods ultimately reach their destination through the agency of strangers to the assured. *Dixon* v. *Reid*, 1 Dow. & Ryl. 207. *S. C.* 5 B. & A. 597.

2. Where a ship was wrecked on the 21st *December*, and three-fourths of her cargo, consisting of wines, were either lost or impregnated with salt water; and the assured gave notice of abandonment as for a total loss on the 23d, (being the day on which they heard of the loss,) and before the remains of the cargo were brought on shore: — Held, that it amounted to such a loss as warranted the notice of abandonment. *Hudson* v. *Harrison*, 6 Moore 288. *S. C.* 3 Brod. & Bing. 97.

3. Where the captain of a vessel, which had been damaged by stormy weather, arrived in *London* on the 25th *April*, where his owners resided; and the latter received the ship's papers on the 3d *May* following, and the broker who effected the policy gave verbal notice of abandonment to the underwriters on the 5th:—Held, that such notice was given in due time. *Read* v. *Bonham*, 6 Moore 397. *S. C.* 3 Brod. & Bing. 147.

4. Where, on an insurance on ship from *Rio de Janeiro* to *Liverpool*, she was captured, and afterwards recaptured; but in the interval, the assured having received intelligence of the capture, gave notice of abandonment; and after the recapture, the ship arrived at *Liverpool*, having sustained a partial damage:—Held, in an action brought to recover a total loss, that the assured could only recover as for a partial loss. *Brotherston* v. *Barber*, 5 M. & S. 418.

(*b*) *Effect and Acceptance of, what shall be.*

1. An abandonment to the underwriters on ship, transfers freight earned subsequently to such abandonment, as incident to the ship:—Therefore, where there had been two separate insurances on a general seeking ship, the one on ship, and the other on freight, and the ship and freight were abandoned to the respective underwriters, who each paid a total loss; and the vessel was captured and recaptured, and ultimately performed her voyage and earned freight:—Held, that the underwriters on ship, under the abandonment of ship

to them, were entitled to such freight. *Davidson* v. *Case* (*in error*), 5 Moore 116. *S. C.* 8 Price 542.

2. Where an insurance was effected at and from *Quebec* to *Teneriffe*, on a cargo consisting of wheat, fish, and staves, and there was the usual memorandum in the policy as to "corn and fish being free from average, unless general;" and the ship was captured and afterwards recaptured, and sent by the recaptors to *Bermuda*, where a scarcity prevailing, an embargo was laid on the export of provisions; and the cargo being landed, it was found that a considerable quantity of the wheat was so damaged by sea water, that it was thrown overboard by order of the magistrates, for the sake of the public health; and the other part of it being also damaged, was sold by the captain, as well as the fish, at a profit; and he put up the ship for sale, which he purchased at one fourth of her value, for the benefit of the owners; and having repaired her, and being refused permission to ship the remaining quantity of wheat to *Teneriffe*, he directed it to be sold, and bought it for the benefit of those concerned; and by leave of the governor, the embargo being then raised as to the *West India* Islands, he shipped the same for *Madeira*, where he arrived and delivered it; and took in a cargo of wine for *London*, with which he arrived:—Held, that the assured, who had abandoned the ship on receiving intelligence of the circumstances which had happened previously to the time of her being permitted to proceed to *Madeira*, were entitled to recover as for a total loss, on the whole of the goods insured. *Cologan* v. *London Assurance Company*, 5 M. & S. 447.

3. Underwriters intending to resist an abandonment, are bound to do so within a reasonable time:—Where, therefore, the assured, four days after a notice of abandonment had been given, called a meeting of the underwriters at *Lloyd's*, three of whom attended and authorised the assured to act as if no insurance had been effected, (the ship having been wrecked, and three fourths of her cargo, consisting of wines, either lost or impregnated with salt water;) and the damaged wines were accordingly advertised for sale; but previous to its taking place, some of the underwriters forbade it, and rejected the notice of abandonment, after more than two months had elapsed, during which time they had not interposed:—Held, that their silence for so long a time was such an acquiescence by them as to amount to an acceptance of the abandonment; and that they could not afterwards prevent the sale. *Hudson* v. *Harrison*, 6 Moore 288. *S. C.* 3 Brod. & Bing. 97.

VIII. ADJUSTMENT.

(*a*) *How made, and Effect of.*

1. Where indigo was insured upon a valued policy, at and from the loading port to the port of delivery: and the ship was sunk at the former port, in consequence of which the indigo was immersed in salt water; and after survey, was sold by public auction there, at a loss of 71*l.* *per cent.*; and a verdict was found for the assured as for a total loss, subject to a reference to an arbitrator to ascertain the amount of such loss, who awarded a loss of 41*l.* 15*s.* 10*d.* *per cent.* on the defendant's subscription:—The Court of C. P. refused to set aside such award, although it appeared that the indigo had been dried by the purchasers at the loading port, and afterwards reshipped by them in other vessels; and that on its arrival at the port of delivery, it produced nearly as much as if it had received no injury whatever. *Hardy* v. *Innes*, 6 Moore 574.

IX. CONSOLIDATION RULE.

1. Where several underwriters entered into a consolidation rule, to abide by the determination of the Court of C. P. on a point reserved for their consideration at the trial of a cause, *viz.* as to whether a notice of abandonment had been given in due time:—That Court would not allow such rule to be opened, on an affidavit stating that the owner had received letters from the captain abroad, informing him of the loss and sale of the ship before the arrival of the latter in *London*; as notice should have been given to the plaintiff to produce such letters at the trial; or they should, at all events, have been adverted to by affidavit, when the motion was made to the Court on the point reserved. *Read* v. *Isaacs*, 6 Moore 437.

X. EVIDENCE.

(a) Mode of Proof.

1. The certificate of an agent for *Lloyd's* at a foreign port, ascertaining an average loss on a cargo damaged by sea water, is not of itself admissible evidence as to the amount of the loss, in an action by the assured against the underwriters in this country. *Drake* v. *Marryatt*, 2 Dow. & Ryl. 696. *S. C.* 1 B. & C. 473.

XI. COSTS.

1. Where the plaintiffs brought four actions against two Insurance Companies for a loss by fire, and a verdict was found for the former against each company, on two of the causes only:—Held, that costs were to be apportioned equally; although three causes only were set down for trial at the same Sittings, there being a demurrer pending in the other. *Severn* v. *Olive*. *Same* v. *Slade*, 6 Moore 235.

XII. INSURANCE BROKER.

(a) His Rights and Liabilities.

1. *Assumpsit* for money had and received is maintainable by an assured part owner of a vessel, against an insurance broker, who has received from the underwriters the full amount of the sums subscribed on a total loss; although there are several other persons interested as part owners, and who had given the defendants notice of their interest, where the plaintiff insured on the whole ship generally, by means of his captain, who gave the order for effecting the insurance. *Roberts* v. *Ogilby*, 9 Price 269.

XIII. AGAINST FIRE.

See also *Severn* v. *Olive*, 6 Moore 235. *suprà.*

1 By a policy under seal, three of the directors of a Fire Association admitted the plaintiff as a member of that society upon the terms and conditions prescribed by the deed of settlement of the association; and he subscribed a certain sum as the consideration-money for one year's insurance; and it was declared, that he should be entitled to a remuneration out of the society's funds, in case of loss by fire happening to any property therein specified, not exceeding the sums set against each article respectively; and it was further stipulated, that neither of the directors who signed the policy, nor the plaintiff, nor the holder of it, should, as members of the society, be subject or liable to any demand for loss, except under the articles establishing the society, and as was provided by the same. The plaintiff having sustained a loss by fire, brought an action of covenant against the directors who signed the policy; and averred in his declaration, that the funds of the association were sufficient to satisfy the amount of such loss; and the Jury found a verdict for him:—Held, that such declaration was sufficient; and that the defendants were liable by the terms of the policy: and the Court of C. P. refused to arrest the judgment. *Andrews* v. *Ellison*, 6 Moore 199.

2. *F.*, *W.*, and *M.*, being trustees and directors of a Fire Insurance Company, executed a policy to indemnify *A.* and others from loss by fire, whereby they ordered, directed and appointed the directors for the time being to pay the loss which *A.* and others should sustain in the event of a fire happening; and the policy, amongst other clauses, went on to recite certain provisions containing the words "conditions and agreements:" and a loss having happened:—Held, that the policy was not an instrument or agreement upon which covenant would lie; and consequently, that neither the executing parties, nor the directors for the time being, were liable at law. *Alchorne* v. *Saville*, 6 Moore 202. (*n.*)

INTEREST OF MONEY.

I. WHERE RECOVERABLE, AND HOW COMPUTED.

See *Rex* v. *Bach*, 9 Price 349. Ante, page 34.
Eaton v. *Bell*, 5 B. & A. 34. Ante, page 150.

1. Interest is recoverable in an action of debt on a mortgage deed, particularly, where there is a covenant for interest in such deed, and which, at all events, would be given as damages for the detention of the debt. *Verney* v. *Iddings*, 2 Chit. 234.

2. The Court will not grant a rule to compute interest on a judgment recovered in an action on a bill of exchange. *Bishop* v. *Best*, 2 Chit. 233.

3. Interest upon a promissory note is to be considered as damages for the detention of the principal money, and forms no part of the original debt:—Where, therefore, a promissory note was made abroad, and the payee did not sue upon it until thirty years afterwards, and the Jury refused to give interest:—Held, after verdict, that the Court could not increase the amount of the verdict by adding such interest. *Du Belloix* v. *Waterpark (Lord)*, 1 Dow. & Ryl. 16.

4. Where an agent having money in his hands belonging to his principal, purchased bills of exchange, which he indorsed specially to the latter, who at the time of the indorsement was dead, but the agent did not know it:—Held, that the administrator of the principal was only entitled to recover interest on bills accepted after the death of the intestate, from the time of the demand of payment made by the administrator; and not from the time the bills became due. *Murray* v. *East India Company*, 5 B. & A. 204.

5. The Court of *Exchequer* refused an application for a rule to compute interest and costs on a sum recovered by verdict, up to a given period, during which the plaintiff had been delayed by every possible expedient and proceeding, for two years and a half; although such application, founded on an affidavit stating the circumstances, and disclosing a case of unparalleled delay and vexation, by which the plaintiff was put to an expense in costs of upwards of 1000*l.* in the ordinary case of an action on bills of exchange. *Jarrold* v. *Rowe*, 8 Price 582.

6. Although the Jury on the execution of a writ of inquiry cannot give interest in an action for work and labour, yet, where they have deducted on the whole amount of the plaintiff's demand ten *per cent.*, in conformity with an agreement between the parties that such deduction should be made for ready money, they may re-allow the plaintiff a proportional part of that deduction, on the balance found to be due to him, and which had remained for a considerable time unpaid. *Milsom* v. *Hayward*, 9 Price 134.

II. WHEN ALLOWED IN ERROR.

1. An affidavit on which to found an application for interest on the balance of a banking account from the entering up of the account till the affirmance of final judgment, must state that it was the custom of the bankers to charge interest on their advances, and at what rate. *Gibson* v. *Carter*, 8 Price 516.

And see *Hamel* v. *Abel*. *Harwood* v. *Underhill*, *Ibid.* (*notis.*)

JURISDICTION.

I. SUPERIOR COURTS.

See *Rex* v. *Kenworthy*, 3 Dow. & Ryl. 173. *S. C.* 1 B. & C 711. Ante, page 48.

1. The Court of *King's Bench* has no authority or jurisdiction to interfere in the regulation and management of the gaols of the kingdom. *Rex* v. *Carlile*, 1 Dow. & Ryl. 535.

2. And the jurisdiction of that Court to try the legality of a distress on the goods of *A.* for an assessment upon *B.* is not taken away by the 33d section of the statute 43 *Geo.* 3, c. 99, which enacts, that "if any question or difference shall arise upon taking any distress, the same shall be determined and ended by two or more of the Commissioners of taxes; and consequently, that an action was

maintainable at common law for a wrongful distress. *Shaftesbury (Earl)* v. *Russell*, 3 Dow. & Ryl. 84. *S. C.* 1 B. & C. 666.

3. So, the 4th section of the 11 *Geo.* 2, c. 19, authorising a landlord to apply to magistrates, and empowering them to proceed to determine the matter, in a summary way, when the value is under 50*l.*, and to issue their warrant to levy the amount adjudged by distress; does not oust the superior Courts of their jurisdiction. *Stanley* v. *Wharton*, 8 Price 301.

4. The Court of *Exchequer* has jurisdiction over recognizances entered into under the 28 *Geo.* 3, c. 52, (providing for petitions against undue returns of Members of Parliament,) upon their being certified into that Court by the Speaker of the House of Commons, on the report of the select committee; and in a case of sufficient merits, they will interfere to discharge such recognizances so estreated on a summary application, by a rule to shew cause. *Ex parte Williams*, 8 Price 3.

II. INFERIOR COURTS.

See Ante. { Costs, I. (*d*), page 84. Inferior Court, page 156.
Post. Justices of Peace. I. next page.
See also *Dunn* v. *Crump*, 3 Brod. & Bing. 309. *Ante, page 27.

1. A spiritual Judge has no jurisdiction over a *trustee* appointed by a testator in his will:—Therefore, where a trustee was committed upon a writ *de contumace capiendo*, under the statute 53 *Geo.* 3, c. 127, for not exhibiting an inventory and account of the goods of a testator, the Court ordered him to be discharged. *Rex* v. *Jenkins*, 3 Dow. & Ryl. 41.

2. The plaintiff sued the defendant in the *Surrey* County Court for a debt contracted in *Middlesex;* and having failed for want of jurisdiction there, proceeded in the *King's Bench;* and though the debt was under forty shillings, that Court refused to set aside the proceedings, as such debt was not recoverable elsewhere. *Eames* v. *Williams*, 1 Dow. & Ryl. 359.

3. An action of *assumpsit* for use and occupation, is a cause of action within the jurisdiction of the *Bath* Court of *Requests'* Act, 45 *Geo.* 3, c. 67; and a defendant occupying a warehouse, though he does not personally reside in that city, is entitled to be sued within the local jurisdiction for a debt under 10*l.* arising out of the limits thereof. *Axon* v. *Dallimore*, 3 Dow. & Ryl. 51.

And see *Baildon* v. *Pitter*, 3 B. & A. 210.

JURY.

1. Where, in a special Jury cause, upon a challenge to the array for unindifferency in the sheriff, the Jury panel was quashed:—Held, that the proper course to obtain a trial of the cause was to direct new Jury process to the Coroner of the county, at the instance of the prosecutor; but not without applying to the Court specially for that purpose. *Rex* v. *Dolby*, 1 Dow. & Ryl. 145.

2. And held, that a *venire facias* was properly awarded to the Coroner, although two of the Special Jurors appeared and were sworn on the former occasion. *Rex* v. *Dolby*, 2 B. & C. 104.

3. The Court of C. P. will not discharge a rule obtained by a defendant for a Special Jury, where no delay appears; nor will it be presumed to have been obtained for delay, although the defendant acknowledged the debt, and it was sworn that it was believed he had no defence to the action. *Briggs* v. *Dixon*, 4 Moore 414.

4. Where, in an action on a bond, the defendant, after plea, had admitted the debt, but obtained a rule for a Special Jury;—the Court of C. P. would not order the cause to be tried within the Term, unless the plaintiff shewed whether it was a fit cause to be tried by a Special Jury, or not. *Tripp* v. *Patmore*, 4 Moore 470.

5. Where the Judge certified that the cause was proper for a Special Jury, the party is only entitled to the costs actually paid to the Jury attending in Court; for it is the constant practice not to allow more costs. *Cursum* v. *Durham*, 2 Chit. 154.

6. The Court will only under particular circumstances grant a view in an indictment for perjury; but a view will be refused, if there be any risk of its misleading the Jury. *Anonymous*, 2 Chit. 422.

7. Where it is shewn to the satisfaction of the Court of *Exchequer*, on a statement of facts by affidavit, that in the reduced list of Special Jurymen, there are persons non-resident or exempt, or that from other causes it is clear that there are less than twenty-four effective Jurymen remaining on the panel, and that it is probable that a sufficient number cannot be had to attend at the trial of a pending information; that Court, on motion, will order a new Jury to be impanelled. *Attorney-General* v. *Goodman*, 8 Price 220.

8. Upon an award of *tales* at *Nisi Prius*, it is not necessary that they should be selected out of persons accidentally present; they may be selected out of those persons whose presence the sheriff or coroner has previously taken means to obtain. *Rex* v. *Dolby*, 2 B. & C. 104. *S. C.* not (*S. P.*) 1 Dow. & Ryl. 145.

9. Affidavits of jurymen may be received on an application for setting aside their inquisition, on the ground of their having allowed interest, where the facts of the case formed the subject matter of the affidavit. *Milsom* v. *Hayward*, 9 Price 134.

10. But where it was sworn by the plaintiff, that hand-bills, reflecting on his character, had been distributed in Court, and shewn to the Jury at the trial;—the Court of C. P. would not receive affidavits of the Jury in contradiction to the plaintiff's statement. *Coster* v. *Merest*, 3 Brod. & Bing. 272.

JUSTICES OF PEACE.

I. JURISDICTION OF.

See the Statute 4 *Geo.* 4, c. 34.

See also *Ex-parte Kite*, 2 Dow. & Ryl. 212. *S. C. nomine Kite and Lane's Case*, 1 B. & C. 101. Ante. page 80.

1. The city of *Bath*, in which the Justices have a separate jurisdiction for some purposes, but not for all, and who commit felons to the county gaol for trial at the Assizes, and thereby burthen the county, is not a liberty or franchise having a separate jurisdiction; and is consequently liable to the *Somersetshire* county rate. *Rex* v. *Clarke*, 1 Dow. & Ryl. 316.

II. POWERS, PRIVILEGES, AND DUTIES.

See the Statute 4 *Geo.* 4, c. 27.

For the notice of action required to be given to Magistrates, see Ante, page 4.

See also *Stanley* v. *Fielden*, 5 B. & A. 425. Ante, page 119.

1. Justices may supersede their own order when improvidently made. *Rex* v. *Norfolk* (*Justices*), 1 Dow. & Ryl. 69. *S. C.* 5 B. & A. 185.

2. And under the statute 1 *Geo.* 4, c. 56, they may award satisfaction for a malicious injury to the amount of 5*l.*; but in each particular case the extent of the injury is to be ascertained by the Justices, and compensation awarded only in proportion to the injury proved. *Rex* v. *Harpur*, 1 Dow. & Ryl. 222.

3. Where Justices have reasonable ground for doubting their jurisdiction, the Court will not compel them to do an act which may subject them to an action. *Rex* v. *Buckinghamshire* (*Justices*), 2 Dow. & Ryl. 689. *S. C.* 1 B. & C. 485.

4. Where an attorney of the Court of *King's Bench* was retained by a prisoner,

charged with felony, to attend and give him his advice and assistance during his examination before Justices, and after notice given to the latter that he attended upon such retainer for that purpose:—Held, that the Justices might forcibly turn him out of the Justice-room, and exclude his presence during the investigation of the case, it being a preliminary investigation only. *Cox* v. *Coleridge*, 2 Dow. & Ryl. 86. *S. C.* 1 B. & C. 37.

Quære—Whether this rule applies where the decision of the Justices is final, as on convictions under penal statutes where no appeal is given? 2 Dow. & Ryl. 86.

5. The statute 13 *Geo.* 3, c. 78, s. 60, imposing a penalty on the driver of a cart, &c. for riding thereon, under the circumstances therein mentioned, authorises a Justice on his own view, or upon the oath of one witness, to convict the offender; and in case he refuses to discover his name, or the name of the owner of the cart, &c., he is subjected to a like penalty, and may, without warrant, be apprehended forthwith by the person seeing the offence committed. —Where the driver of a waggon committed an offence within this act, in the view of a Justice; and placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner; and the Justice, in order to ascertain the name, stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership:—Held on demurrer, that this was a trespass, and gave the driver a right of action. *Jones* v. *Owen*, 2 Dow. & Ryl. 600.

III. ORDERS OF.

For the requisites of an order of filiation, see Ante, tit. BASTARDS, page 61.

For the construction of an order of Justices to raise money on the credit of a County rate, see Antè, tit. COUNTY RATE, 2, 3. page 91.

For the form and requisites of orders for stopping up or diverting highways, see Ante, tit. HIGHWAYS, II. page 148.

For orders of removal, see Post. tit. POOR.

IV. COMMITMENTS BY.

See also tit. COMMITMENT, Ante, page 78.

1. A commitment for punishment must be for a time certain:—Where, therefore, a defendant was committed by two Justices for a contempt towards them in their office, "until discharged by due course of law:"—Held, that such commitment was bad. *Rex* v. *James*, 1 Dow. & Ryl. 559. *S. C.* 5 B. & A. 894.

2. A general commitment until the putative father of a bastard child should pay two *several sums*, one for maintenance and the other for costs, is bad *in toto*; and where such order has been made, and the time for appeal elapsed, it cannot be enforced under the statute 18 *Eliz.* c. 3, but the magistrate must convict for three months under the 49 *Geo.* 3, c. 68, s. 3. *In re Addis*, 2 Dow. & Ryl. 167. *S. C.* 1 B. & C. 87.

3. A commitment in execution need not recite the title of the statute on which the proceeding is founded; and it is no offence within the statute 1 *Geo.* 4, c. 56, "wilfully or maliciously to carry away" a post or pale, unless the party charged has wilfully or maliciously committed the damage, injury, or spoil alleged:"—Therefore, where a defendant, charged with cutting, spoiling, and taking and carrying away a post out of a fence, was committed for wilfully and maliciously *carrying the same away* only:—Held, that the commitment was bad, and the defendant entitled to be discharged. *Rex* v. *Harpur*, 1 Dow. & Ryl. 222.

4. The penalties imposed by the statute 1 & 2 *Geo.* 4, c. 118, s. 40, are directed to be distributed, one half to the receiver therein mentioned, and the other to such persons as the convicting Justices shall direct; and it gives no appeal to the Sessions:—Where, therefore, a prisoner was committed under a warrant of execution which recited that he had been convicted for two months, or until he paid a penalty of 5*l.* for an offence under the 33d section of the act, without stating how the penalty was to be distributed and to whom paid; the Court refused to discharge him out of custody, as the warrant did not require the same certainty as a conviction; and they were bound to presume there had been a legal conviction to found the warrant. *Rex* v. *Rogers*, 1 Dow. & Ryl. 156.

And see *Rex* v. *Croker*, 2 Chit. 138. Ante, tit. COMMITMENT.

V. PROCEEDINGS AGAINST.

(a) By Information.

For proceedings against Magistrates by action, See ACTION, II. (b), 2. Ante, page 3; IV. (b), page 4; ACTION ON THE CASE, I. (a), 1. page 5.

1. Where facts tending to criminate a magistrate took place twelve months before the application to the Court, they refused to grant a criminal information; although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till a very short time before the application was made. *Rex* v. *Bishop*, 5 B. & A. 612.

2. No will they grant a *certiorari* in the first instance to remove the order for the appointment of overseers for the purpose of having it quashed, on a suggestion that the Justices made the appointment from corrupt and improper motives; the propriety of the appointment being matter of appeal to the Sessions: but they will grant a criminal information against the Justices, if the corrupt and improper motives for making the appointment be satisfactorily established. *Rex* v. *Somersetshire (Justices)*, 1 Dow. & Ryl. 443.

3. *Quære*—Whether a criminal information will lie against Justices for making a false return to a *mandamus*, unless the return is corruptly and wilfully false? *Rex* v. *Lancashire (Justices)*, 1 Dow. & Ryl. 485. *S. C.* (not *S. P.*) 5 B. & A. 755.

KING'S BENCH PRISON.

RULES OF.

1. No clerk, turnkey, officer, or other person employed by or under the Marshal, can in future receive or take, except from the Marshal, any fee, gratuity, or reward, for or in respect of making inquiry into the sufficiency of any person or persons proposed or intended to give security upon the granting of the rules of the *King's Bench* prison, or otherwise in respect of the granting of the said rules; and the Marshal may dismiss any person who shall offend therein; and a copy of the rule must be kept hung up in the prison, in the place where the table of fees is hung up. *Reg. Gen. H. T.* 2 & 3 *Geo.* 4. 1 Dow. & Ryl. 471. 5 B. & A. 560. 2 Chit. 376.

2. A prisoner in custody for a contempt, is not entitled to the rules of the *King's Bench* prison: but where the Marshal, in consequence of a surgeon's certificate, that a prisoner in his custody for a contempt in not paying money pursuant to the Master's *allocatur* was dangerously ill, and would die if closely confined; allowed the prisoner the privilege of the rules until he regained his health, and afterwards confined him again within the walls; the Court refused to proceed against the Marshal, by ordering him to pay the money for the non-payment of which the prisoner was in contempt, and dismissed the application with costs. *Hall* v. *Arnold*, 2 Dow. & Ryl. 709.

LANDLORD AND TENANT.

I. PRIVILEGES OF LANDLORD.

See also Ante, tits. COVENANT. DISTRESS, *passim*. EJECTMENT, II.

1. Where a tenant omitted to deliver up possession, his term having expired after a regular notice to quit, and the landlord broke open the door of the house in his absence, and got possession, although some few articles of furniture remained therein; and the tenant hav-

ing brought trespass against the landlord for the entry and recovered a verdict, the Court of C. P. granted a new trial, on the ground that the landlord had a right of entry. *Turner* v. *Meymott*, 1 Bing. 158.

II. CONTRACTS BETWEEN.

(*a*) *How construed.*

1. Where a lessee has power to renew his term, upon giving six months notice of his intention before its expiration, and upon his preparing a fresh lease, &c.; he cannot, though he gave notice of such his intention, demise the premises to another party beyond the expiration of the first term, unless he prepares such fresh lease, and gets it executed, or endeavours so to do. *Mackay* v. *Mackreth*, 2 Chit. 461.

III. RENT.

(*a*) *When, by, and to whom payable.*

See { DISTRESS, Ante, pages 111, 112. EJECTMENT, II. Ante, page 114. EXECUTION, III.(*c*), (*d*), pages 131, 132. USE AND OCCUPATION, Post.

And see *Doe d. Rudd* v. *Golding*, 6 Moore 231. Post. next page.

1. Where a lease was made to *A.* of two houses adjoining each other at one entire rent of 65*l.* 10*s.*, and the lessor conveyed one of the houses by deed, (to which the lessee was no party,) to *B.* in fee, at an apportioned rent of 40*l.*:—Held, that such apportionment should have been made by a Jury to give it validity, inasmuch as the grantee had not acquired the same rights and remedies against *A.* the lessee, as he would have acquired under the legal apportionment by a Jury:—the lessee not being bound by the apportionment in the conveyance to which he was no party, and the propriety of which he might dispute. *Bliss* v. *Collins*, 1 Dow. & Ryl. 291. *S. C.* 5 B. & A. 876.

2. Where two tenants in common of a dwelling-house and premises demised the same jointly to *C.* in 1810, and he regularly paid his rent in one sum to their joint agent to 1818, in which year he received notice from one of the tenants to pay the moiety of the rent in future to him or his agent separately; and from that time to 1819, he accordingly paid his rent in equal moieties to the separate agent of the landlords, who gave him separate receipts for the same on account of each:—Held, in a joint action for use and occupation for two years' subsequent rent, that such tenants were properly joined, notwithstanding the severance of the rent; and that it was a question of fact for the Jury to say whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powis* v. *Smith*, 1 Dow. & Ryl. 490. *S. C.* 5 B. & A. 850.

3. Where *A.* who held premises under a lease which expired at *Midsummer* 1821, refused to give up the possession at that time, and insisted upon a notice to quit; and continued in possession till *Christmas*, and paid rent at *Michaelmas* and *Christmas*:—Held, that this was conclusive evidence of a tenancy; and that the landlord was entitled to recover a quarter's rent due at *Lady-day* 1822. *Bishop* v. *Howard*, 2 B. & C. 100.

4. A bankrupt proposed, after an act of bankruptcy, to dispose of a beneficial lease; but the purchaser refused to take it unless five quarters' rent in arrear to the landlord were first paid. After a negotiation between the bankrupt and the landlord, who knew the situation of the former, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises; but the landlord having a right of re-entry:—Held, that the assignee of the bankrupt could not recover from the landlord the rent so paid him. *Mavor* v. *Croome*, 1 Bing. 261.

IV. NOTICE TO QUIT.

(*a*) *Who entitled to, and how given.*

See *Doe d. Cardigan (Earl)* v. *Roe*, 1 Dow. & Ryl. 540. *Doe* v. *Bradbury*, 2 Dow. & Ryl. 706. Ante, page 114.

1. Where a chaplain of a college, holding a curacy with a dwelling attached thereto, and ceasing to hold that office, retained possession of the dwelling:—Held, that he was not a curate within the meaning of the 57 *Geo.* 3, c. 99, s. 67, and that he might be evicted by a notice to quit forthwith; and was not entitled to the three months' notice required to be given by that statute, with

the consent of the bishop. *Goodtitle d. Lincoln College (Master and Fellows),* v. *Lee,* 2 Dow. & Ryl. 718.

2. A notice by the owner of premises, requiring a tenant in possession "to leave the premises he then rented of the owner, at *Lady Day* next;" is not conclusive evidence of a demise from a testator to the party in possession. *Doe d. Wilcockson* v. *Lynch,* 2 Chit. 683.

And see *Bishop* v. *Howard,* 2 B. & C. 100. Ante. last page.

LEASE.

I. WHAT INSTRUMENT SHALL AMOUNT TO.

For the construction of Provisoes and Covenants in Leases, see tit. COVENANT, III. IV. Ante, pages 93—4.

For Leases granted by virtue of Powers, see Post. tit. POWER.

See also Ante. tit. LANDLORD AND TENANT.

Post. tits. {STAMPS. WAY.

See also *Doe d. Anglesea (Marquis)* v. *Roe,* 2 Dow. & Ryl. 565. Ante. page 115.

1. Where a tenant was in possession under a memorandum of agreement, whereby the defendant as lessor agreed to let a house on lease, with a purchasing clause, for twenty-one years, at the net clear rent of 63*l.* *per annum;* the tenant to enter at any time on or before a particular day, on paying the sum of 50*l.* on entry:—Held, that this only amounted to an agreement for a future lease; and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain. *Dunk* v. *Hunter,* 5 B. & A. 322.

II. VOID OR FRAUDULENT.

See also Post. tit. STAMPS.

1. By a marriage settlement, the husband had the wife's estate for life, with a power to grant leases for twenty-one years, but no longer. In breach of the power, he granted a lease to *A.* for ninety-nine years, determinable upon lives. The wife survived him, and conveyed the fee to *B.*; and in the conveyance, was recited the lease to *A.*, who was recognized as being then tenant in possession of the estate, at the yearly rent reserved. On an action of ejectment brought by *B.* against the assignee of the lease:—Held, that the lease being void, and the recital only matter of description, no demand of possession was necessary to sustain the action. *Doe d. Biggs* v. *White,* 2 Dow. & Ryl. 716.

2. Waste and unreclaimed land belonging to a vicarage, which land had remained uninclosed and useless in consequence of the inability of successive vicars to defray the expenses of inclosure, was let (never having been demised before) by the incumbent, with the confirmation of the patron and ordinary, to *J. S.* for three lives;—he undertaking to inclose and reclaim the land, and to pay a rack-rent:—Held, that this lease was not binding on the incumbent's successor, as the statute 13 *Eliz.* c. 10, s. 3, applies only to lands which have been previously demised. *Doe d. Tennyson* v. *Yarborough (Lord),* 1 Bing. 24.

III. TERMINATION OF.

(a) *By Condition or Proviso.*

1. Where a lease contained two clauses for re-entry; the one, in case the yearly rent of 300*l.* was in arrear thirty days after it became payable; and the other, in case the yearly rent were in arrear, which was stated to be payable half-yearly, at *Lady Day* and *Michaelmas:*—Held, that the landlord had a right to re-enter on non-payment of each half-year's rent; as the former clause contained the description of the amount to be annually paid, and the latter the times for payment. *Doe d. Rudd* v. *Golding,* 6 Moore 231.

(b) *By Forfeiture.*

1. A demand of rent due from the lessee to the lessor, though made of a

stranger, if made upon the land is a sufficient demand, and need not be general to sustain ejectment for a forfeiture for non-payment of rent being lawfully demanded. *Doe d. Brook* v. *Brydges*, 2 Dow. & Ryl. 29.

2. A deed of conveyance which omits to set out truly the whole consideration directly or indirectly paid, or agreed to be paid for the estate conveyed, is not void by the statute 48 *Geo.* 3, c. 149, s. 22:—Therefore, in ejectment for a forfeiture, where a lease was supposed to have omitted part of the consideration:—Held, that this was no answer to the action. *Doe d. Higginbotham* v. *Hobson*, 3 Dow. & Ryl. 186.

LEGACY DUTY.

1. A legatee, under a bequest of wines, which arrived in the port of *London* in a ship; and the report of her arrival was made before the death of the testator, but the entry of the wines was not made until after that event;—is not subject to the payment of the duties, the executor being bound to pay them out of the assets. *Sewart* v. *Denton*, 2 Chit. 456.

2. A legacy of the residue of a testator's personal estate, bequeathed to *B.* his son-in-law, and *P.* the wife of *B.* (the testator's daughter,) their executors, &c. for their absolute benefit,—is not liable to the duty of 1*l. per cent.* on the whole, as a bequest to or for the benefit of *P.*, a daughter of the testator; nor to 10*l. per cent.* on the whole, as being given to, or devolving on, or for the benefit of, *B.*, a stranger in blood of the deceased; but is liable to the payment of 1*l. per cent.* as to one moiety, and 10*l. per cent* as to the other. *Attorney-General* v. *Bacchus*, 9 Price 30.

LIBEL.

I. ACTION.

(*a*) *In what Cases maintainable.*

See *Rex* v. *Waddington*, 1 B. & C. 26. Post. next page.

1. A person who pursues an illegal avocation, such as a public room for pugilistic exhibitions, cannot maintain an action for a libel regarding his conduct in such avocation. *Hunt* v. *Bell*, 1 Bing. 1.

2. The memorial of a tradesman addressed to the Secretary at War, complaining of the conduct of a half-pay officer in the army for not having paid a debt due to him, and stating the facts of his case fairly and honestly, according to his opinion and understanding of such facts, is not the subject of an action for a malicious libel, although the statement of those facts is derogatory to the character of the officer. *Fairman* v. *Ives*, 1 Dow. & Ryl. 252. S. C. 5 B. & A. 642.

(*b*) *Pleadings and Evidence.*

1. Where the first and second counts of a declaration alleged "the composing and publishing of two libels," and the defendant in his pleas of justification stated, that "the libels so set forth were one and the same supposed libel, and not other and different supposed libels:"—Held, that such pleas were bad on special demurrer, because it was impossible to say with truth that the two libels alleged to have been severally composed and severally published were one and the same libel. *Edmonds* v. *Walter*, 2 Chit. 291.

2. Where an account of certain proceedings in the Insolvent Debtors' Court was headed in a newspaper, "Shameful

conduct of an attorney." Pleas to a declaration for a libel on the plaintiff in his profession as an attorney, that the alleged libel contained a faithful and true account of proceedings in such Court, were held ill;—as the words "Shameful conduct of an attorney," formed no part of the proceedings in the Insolvent Court. *Clement* v. *Lewis (in error),* 3 Brod. & Bing. 297.
S. C. K. B. 3 B. & A. 702.

3. Where the commander-in-chief directed a military inquiry to be held to investigate the conduct of a commissioned officer in the army, who afterwards sued the President of such Court of Inquiry for a libel stated to be contained in his report, and transmitted by him to the commander-in-chief: — Held, that such report was a privileged communication, and properly rejected in evidence at the trial; and that an office copy thereof was also inadmissible. *Home* v. *Bentinck (in error),* 4 Moore 563.

4. A petition addressed by a tradesman to the secretary at war, complaining of the conduct of a half-pay officer in not paying his debts, and stating the facts of his case *bonâ fide*, is not the subject of an action for a libel; and evidence, shewing the occasion of the writing, is admissible under the general issue, to shew that the writer believed the facts stated in the petition to be true, although no justification was pleaded. *Fairman* v. *Ives,*
1 Dow. & Ryl. 252.
S. C. 5 B. & A. 642.

5. But in an action for a libel, to which the defendant only pleaded the general issue; evidence of facts, though not amounting to a justification, cannot be received to negative the presumption of malice, and mitigate the damages. *Waithman* v. *Weaver,*
1 Dow. & Ryl. N.P.C. 10.

6. Where, in an action for a libel, the declaration alleged, that the defendant had composed, written, and published the libellous matter;—and it appeared from the libel itself, that the defendant had given references to another work, from which the matter was taken, but which were omitted in the declaration: —Held, that the variance was fatal, inasmuch as the sense of the libel declared upon was different from that produced in evidence. *Cartwright* v. *Wright,*
1 Dow. & Ryl. 230.
S. C. 5 B. & A. 615.

II. INFORMATION.

(a) Where supportable.

1. An affidavit to found a motion for a criminal information for a libel, must distinctly negative the charge, unless the party libelled be abroad, or the charge be general. *Rex* v. *Wright,*
2 Chit. 162.

2. The Court will grant a criminal information against the publisher of a newspaper for a libel reflecting on the clergy of a particular diocese, and generally upon the clergy of the Church of *England*, though no individual prosecutor was named, and though the libellous matter was not negatived on affidavit:— It is sufficient to state the publication of the libel by the defendant. *Rex* v. *Williams,* 1 Dow. & Ryl. 197.
S. C. 5 B. & A. 595.

3. A publication stating *Jesus Christ* to be an impostor and a murderer in principle, is a libel at common law; for which an information will lie. *Rex* v. *Waddington,* 1 B. & C. 26.

LIEN.

I. IN WHAT CASES ACQUIRED.

For the lien of attornies for costs, see Ante, page 35.

1. A dyer has only a qualified lien upon an article delivered to him to be dyed, *viz.* for the particular price of dying such article, and not for his general balance. *Bennett* v. *Johnson,*
2 Chit. 455.

2. Where the owner of goods was indebted to a factor in a sum exceeding their value, and consigned them to him for sale; and the factor being indebted to *J. S.* in more than their worth, sold them to him, and afterwards became

bankrupt; and on a settlement of accounts between *J. S.* and the assignees of the factor, the former allowed credit to them for the price of the goods, and then proved the residue of his claim against the estate:—Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees was a good answer to an action against the vendee for the price of the goods, brought either by, or on the account of the original owner. *Hudson* v. *Granger*, 5 B. & A. 27.

3. If a policy of insurance be left in the hands of an agent for safe custody only, although he advances money to the assured, without any other security than the policy, the agent acquires no general lien on the instrument for such advances:—But it is otherwise if it were left with him as a security generally. *Muir* v. *Fleming*, 1 Dow. & Ryl. N.P.C. 29.

4. The defendant, as owner of a ship, entered into a charterparty with the freighter, by which the former "granted and to freight let," and the latter "hired and to freight took the ship," for a voyage out and home. The owner covenanted that the vessel, being well manned and furnished, as is usual for vessels in the merchants' service, the master should receive on board at *London*, goods to be sent alongside her there by the freighter, and deliver them from alongside at *Newfoundland*, to the agents of the freighter, according to bills of lading; and such cargo having been discharged there, to receive other goods in like manner, and deliver them at *Demerara*; and having discharged the same, should receive other goods there, and deliver them at *London*, agreeably to bills of lading. The owner also agreed, that the ship's boats should assist in unloading and loading the cargoes when required by the freighter, provided no impediment was thereby to be made in carrying on the exclusive duties of the ship:—In consideration whereof, the freighter covenanted to send and take the goods from alongside, and to pay for the freight and hire of the vessel for the voyage, 2600*l.* with primage, &c.; one quarter part thereof on delivery of the cargo at *Newfoundland*, by good bills at sixty days' sight on *London*, and the remainder by good bills at two months' date, from the day of the ship's report inwards at the port of *London*. The voyage was performed, and goods of third persons brought from *Demerara* under bills of lading, deliverable to the consignees, on payment of certain specified freight therein mentioned, which freight the owner received. Bills of exchange for one quarter's freight were drawn on the freighter at *Newfoundland*, which were afterwards accepted and dishonoured by him; and no sum nor bill for the remaining three quarters' freight *per* charterparty, were given or tendered to him on the return of the ship:—Held, that the owner had a lien on the goods of the consignees of the homeward cargo, mentioned in the bills of lading, to the extent of the freight stipulated for therein, as a security for his freight due upon the charterparty. *Christie* v. *Lewis*, 5 Moore 211.

5. Where a ship was transferred while at sea to a vendee resident in the port in which she was registered, and money was paid by the vendee's agents under the sentence of a foreign Court, for salvage and wages of the captain and crew, provisions, and sundry ship disbursements:—Held, that the salvage and mariners' wages were a lien on the ship, but not the sums paid for the captain's wages, nor the disbursements. *Richardson* v. *Campbell*, 5 B. & A. 203. (*n.*)

II. WHERE DISCHARGED.

1. Where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular articles, but also for any general balance due from their respective owners; and goods were sent by the carrier addressed to the order of *J. S.* who was merely a factor:—Held, that the carrier had not any lien as against the real owner, for a balance due from *J. S.* *Wright* v. *Snell*, 5 B. & A. 350.

Quære—Whether, if he had given notice that all goods to whomsoever belonging, should be subject to a lien for any general balance that might be due from the persons to whom they were addressed, he would have any right to retain goods for a balance due from *J. S?* 5 B. & A. 350.

LIMITATION OF ACTIONS.

I. IN WRITS OF FORMEDON.

1. The twenty years within which a *formedon in descender* must be brought under the statute 21 *Jac.* 1, c. 16, s. 1, begin to run when the title descends to the first heir in tail; and there is no distinction between the heir of a tenant in fee taking by descent, and the heir of a tenant in tail. *Tolson* v. *Kaye*, 6 Moore 542. S. C. 3 Brod. & Bing. 217.

II. RIGHT OF ENTRY.

1. Where *A.* mortgaged his premises in fee to *B.*, with a proviso for redemption on payment of the mortgage-money on a given day; but *A.* continued in possession until his death: after which *C.* his son and heir, and his widow, continued in possession until the death of the latter; when *C.* conveyed the premises in fee to *D.*, who levied a fine with proclamations and entered into possession. On an ejectment being brought by *E.*, the heir-at-law of *B.* the original mortgagee, and a special verdict found as a fact the non-payment of the mortgage debt on the given day, without finding either an adverse possession by *A.* or his heir, or that interest had been paid upon the mortgage-money by the mortgagor:—Held, that though there had been a lapse of thirty-seven years since default in payment of the principal, the statute of limitations was no bar to the ejectment, and consequently, that the mortgagee was not precluded thereby. *Hall* v. *Doe d. Surtees*, 1 Dow. & Ryl. 340. S. C. 5 B. & A. 687.

2. Returns of any particular subject matter by auditors in their accounts of the Crown revenue, are sufficient proof of its having been kept in charge to protect the claim of the Crown from the operation of the *Nullum Tempus* Act, 9 *Geo.* 3, c. 16, although they have returned "*Nihil*," and the claim has not been put in suit thereon for more than sixty years. *Attorney-General* v. *Eardley (Lord)*, 8 Price 39.

3. So, if the auditors make due returns to the office of Commissioners for auditing the public accounts, of the rents and other profits of lands, &c. forming part of the Crown revenue, those returns constitute a putting in charge within the meaning of that statute, so as to save the right of the Crown from the operation of that act; although the auditors have for more than sixty years received nothing in respect of such revenue, and though the Crown within that time had not instituted any suit or proceeding to recover any part of it. *Attorney-General* v. *Maxwell*, 8 Price 76. (*n.*)

III. ASSUMPSIT.

(*a*) *Action, from what time to be computed.*

1. Where the plaintiff, in a declaration of *assumpsit*, stated that he employed the defendant to invest and lay out the plaintiff's money in an annuity on a good and sufficient security, which the defendant promised to do; and assigned for breach, that he laid it out on an invalid and fraudulent security:—Held, that the statute of limitations was a good bar to the plaintiff's recovery, as the promise of the defendant was the gist of the action, although it was commenced within the period of six years from the time it was discovered that the security was invalid, and the defendant knew it to be so at the time the annuity was granted. *Brown* v. *Howard*, 4 Moore 508.

2. *Semble*, that in cases of fraud the statute only runs from the time such fraud is discovered. 4 Moore 508.

3. In an action of *assumpsit* by an administrator upon a bill of exchange, payable to the testator, but accepted after his death:—Held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of

action until there is a party in a capacity to sue. *Murray* v. *East India Company,* 5 B. & A. 204.

(*b*) *What acknowledgment will take a Case out of the Statute.*

1. Where the plaintiff, in a declaration of *assumpsit*, stated, that in consideration that he would employ the defendant (an annuity broker) to invest and lay out the plaintiff's money in the purchase of an annuity, the defendant undertook to invest it on good and valid security; and assigned for breach, that he laid it out on a bad, invalid, and fraudulent security; and the defendant pleaded *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*, on which issue was joined; and it was proved that the consideration-money was paid over to the grantor, and the annuity paid by the hands of the defendant to the plaintiff for six years afterwards, when the grantor became bankrupt, and the security failed;—subsequently to which, the defendant's managing clerk promised that the plaintiff should be paid, which promise the defendant afterwards recognised: — Held, that the undertaking stated in the declaration being as to the validity of the security, the subsequent promise could not apply, although it might have given a new right of action on a declaration specially framed for that purpose. *Whitehead* v. *Howard,* 5 Moore 105

2. An agreement for a compromise made between father and son, whereby the former engaged that on the son's signing certain deeds, for the purpose of settling the title to some reversionary family property, with respect to which there was a dispute between them; he (the father) would give up to the son a promissory note, given by the latter to the former for 1000*l.*:—Held to be admissible in evidence in an action brought by the administrator of the father against the son, to recover the 1000*l.* on the note, for the purpose of taking the demand out of the statute, which had been pleaded, as being an admission that the note was, *at the date of the agreement*, in existence and unpaid; for such an agreement is not within the rule of law which excludes from evidence admissions made during *a treaty for a compromise* of litigation: that rule is applicable only to treaties for the purpose of ending suits, which are not eventually brought to a conclusion; but does not apply to agreements perfected and executed, although the subject matter and objects of such agreements may be a compromise of *previously* existing differences between the parties. *Froysell* v. *Lewelyn,* 9 Price 122.

3. Where, in an action on a promissory note, the defendant pleaded the statute, and the plaintiff gave in evidence, as proof of an acknowledgment within six years, a letter from the defendant to him, stating that "business called him to *L.*, but should he be fortunate in his adventures, the plaintiff might depend on seeing him at *B.*; otherwise, that he must arrange matters with the plaintiff as circumstances would permit;" and the defendant did not shew that there were any other matters besides the promissory note to which this letter could refer:—Held, that it was properly left to the Jury to decide whether such letter referred to the matter of the note and was a sufficient acknowledgment to take the case out of the statute. *Frost* v. *Bengough,* 1 Bing. 266.

4. Where an action of *assumpsit* was brought on a joint promissory note made by *A.* and *B.*, whilst *B.* was sole, against *A.*, *B.*, and *C.* the husband of the latter, who was joined for conformity; and they pleaded *actio non accrevit infra sex annos;* to which the plaintiff replied, that the cause of action arose within six years; on which issue was joined:—Held, that an acknowledgment by *A.* within six years, that the debt was due, would not take the case out of the statute of limitations, such acknowledgment being made after the intermarriage of *B.* and *C.* *Pittam* v. *Foster,* 2 Dow. & Ryl. 363. *S. C.* 1 B. & C. 248.

5. *A.* and *B.* made a joint and several promissory note; and after the lapse of six years *A.* died, leaving *B.* one of his executors, who ten years after the death paid interest on the note, but not in his character of executor, but personally as a maker of the note. In an action on the note by the executors of the payee, against the executors of *A.*, alleging, first, a promise by the testator in his lifetime; and secondly, a promise by the executors after his death:—Held, that the payment of interest by *B.* (who suffered judgment by default) within six years from the commencement of the

action, was not sufficient to take the case out of the statute, so as to make *A.*'s executors liable. *Atkins* v. *Tredgold*, 3 Dow. & Ryl. 200. *S. C.* 2 B. & C. 23.

6. In *assumpsit* for seaman's wages, to which the statute was pleaded, it was proved that the defendant being applied to for payment, after the lapse of six years, said, "I will see my attorney, and tell him to do what is right;"—it seems that this was not a sufficient acknowledgment to take the case out of the statute. *Miller* v. *Caldwell*, 3 Dow. & Ryl. 267.

7. Where *A.*, through misrepresentation, received of *B.* and several other persons, his tenants, sums of money, to which he was not entitled; and *B.* applied to him to have the money returned, stating that he and the other tenants had been induced to pay more than was due; and *A.* replied, "that if there was any mistake, it should be rectified:"—Held, that this obviated the statute as to payments made by the other tenants, as well as by *B.* *Clark* v. *Hougham*, 2 B. & C. 149.

(c) *Statute, how pleaded.*

1. Where a declaration stated that certain bills of exchange were drawn and accepted after the death of an intestate; that letters of administration were granted to the plaintiff, and that the defendants were liable as acceptors to pay the administrator; and they pleaded that the cause of action did not accrue within six years; to which the plaintiff replied generally, that it did accrue within six years:—Held, that the replication was good. *Murray* v. *East India Company*, 5 B. & A. 204.

2. Where, to a plea of *non assumpsit infra sex annos*, the plaintiff replied that the defendant did promise within six years;—fraud in the defendant cannot be set up as an answer to the plea. *Clark* v. *Hougham*, 2 B. & C. 149.

Quære—Whether it would have been a good answer if specially replied. 2 B. & C. 149.

IV. OPERATION OF, HOW AVOIDED.

(a) *By Process.*

1. In order to save the statute, it is sufficient if the writ be sued out, and the return thereon indorsed upon it in time; and it is not necessary that the writ should be delivered out of the Sheriff's office as returned. *Taylor* v. *Hipkins*, 5 B. & A. 489.

2. And where, in an action of trover brought in C. P. to try the validity of a commission of bankruptcy issued against the plaintiff by the defendant as his assignee, the latter produced an office copy of a roll in the Court of K. B., by which it appeared that an action had been commenced there against the plaintiff and his partner more than six years before, and continuances brought down to the Term before the trial in C. P.:—Held, that the petitioning creditor's debt, on which the commission was founded, was not barred by the statute of limitations; for as long as a remedy is open by which the debt may be recovered any where, it does not fall within the operation of the statute. *Gregory* v. *Hurrill*, 6 Moore 525. *S. C.* 3 Brod. & Bing. 212.

3. Suing out a *testatum capias ad respondendum* is a good commencement of an action *by original*;—Therefore, where the defendant pleaded to a declaration by original, *actio non accrevit infra sex annos*, on which issue was joined:—Held, that the *testatum capias ad respondendum* (which was the first writ issued) was good evidence to take the case out of the statute. *Beardmore* v. *Rattenbury*, 1 Dow. & Ryl. 27. *S. C.* 5 B. & A. 452.

V. IN TRESPASS OR CASE.

1. Where an officer in the preventive service boarded a ship, and left three men on board, and two days afterwards decided on seizing her; and the owner having sued him for such seizure:—Held, that the three months within which the action should have been commenced, under the statute 28 *Geo.* 3, c. 37, must be computed from the day of boarding the vessel. *Crook* v. *M'Tavish*, 1 Bing. 167.

2. Subsequent admissions of having committed a trespass, will not take the case out of the statute. *Hurst* v. *Parker*, 2 Chit. 249.

3. A surveyor under a local Drainage Act may take advantage of a clause limiting the commencement of actions to six months after the act done, although it does not appear that a compensation, as directed by the statute for

the act complained of, has been made, or a certain course therein specified pursued, on the observance of which he could only have a right of entry on the lands of others. *Boothby* v. *Morton*, 3 Brod. & Bing. 239.

LITERARY PROPERTY.

1. The proprietor of the copyright of a tragedy, which has been printed and published for sale, cannot maintain an action against the manager of a theatre for publicly acting and representing such tragedy in an abridged form for profit. *Murray* v. *Elliston*, 1 Dow. & Ryl. 299. *S. C.* 5 B. & A. 657.

2. The mere seller or publisher of a pirated copy of a print, is liable to an action under the 17 *Geo.* 3, c. 57, although it be not an exact copy of the original, and though the seller did not know it to be a copy. *West* v. *Francis*, 1 Dow. & Ryl. 400. *S. C.* 5 B. & A. 737.

3. A printer cannot recover for work and labour or materials used in printing any work, unless he affixes his name to it, pursuant to the statute 39 *Geo.* 3, c. 79, s. 27. *Bensley* v. *Bignold*, 5 B. & A. 335.

And see *Marchant* v. *Evans*, 2 Moore 14.

LOTTERY.

1. The City Lottery Act, 46 *Geo.* 3, c. 97, vests the prizes therein enumerated in five trustees by name, in trust, for the purposes of the act; and by the 16th section it is enacted, that "in case of the death of one or more of the trustees before the drawing of the lottery, and the conveyance of the prizes to the fortunate holders of the tickets, the survivors shall, and they are thereby required, to fill up the vacancy or vacancies by the election of some other persons, for the purposes of the act:"—Held, in an action of ejectment, that the conveyance of a prize to the lessor of the plaintiff, by four only of the five trustees (one having died), was valid; and it seems that such conveyance would be effectual, though no proof was given that the lessor of the plaintiff was the fortunate holder of the ticket to which the prize had fallen. *Doe d. Read* v. *Godwin*, 1 Dow. & Ryl. 259.

MANDAMUS.

I. IN WHAT CASES AND HOW GRANTED.

1. If there are words of permission in a charter, to do an act which is clearly for the public benefit, they are obligatory:—Therefore, where a charter declared that the mayor and jurats of an ancient town might hold a court of record for the holding of pleas, but which had been long disused, the Court of K. B. granted a *mandamus* to compel such court to be held, at the instance of an inhabitant of the town, though he was not a corporator. *Rex* v. *Hastings* (*Mayor, &c.*), 1 Dow. & Ryl. 148. *S. C.* 5 B. & A. 692. *n.*

2. So, where a charter of 2 *Jac.* 1, granted to the steward and suitors of a manor, *power and authority* to hold a Court, for the purpose (amongst other objects) of hearing and determining pleas

of debt, &c., but the Court had been disused for that purpose during fifty years:—Held, that a *mandamus* would lie to compel the Court to be held again for such purpose, notwithstanding the non-user. *Rex* v. *The Manor of Haveringatte-Bower* (*Steward*),

2 Dow. & Ryl. 176, *n.*
S. C. 5 B. & A. 691.

3. And where the bailiffs and burgesses of an ancient borough had been from time immemorial lords of the manor, and owners of the *Guildhall* within the *Borough*; and by a charter of *Phil.* & *Mary*, power was granted to them to hold manor Courts in the *Guildhall* twice in every year, as of ancient time; and until 1807, such Courts had been time immemorially held; and in that year Commissioners under an Inclosure Act awarded to Lord *H.* all the said manor, with the rights, members, courts, view of frankpledge, excepting to the bailiffs and burgesses the *Guildhall*, &c.; and until 1821, Lord *H.* held Courts in the *Guildhall*, and being then obstructed; it seems that a *mandamus* would lie to the bailiffs and burgesses to compel them to allow the manor Courts to be held in the *Guildhall*. *Rex* v. *Ilchester* (*Borough*) *Bailiffs and Burgesses*,

2 Dow. & Ryl. 724.

4. A *mandamus* was granted in the first instance where a mayor held over, or where actual vacancy was occasioned by death. *Rex* v. *Truro* (*Mayor*),

2 Chit. 257.

5. So in the case of a vacancy of a capital burgess. *Ilchester Case*,

2 Chit. 257.

6. Payment of a fine imposed by the bye laws of a corporation, for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled to do so by *mandamus*. *Rex* v. *Bower*,

2 Dow. & Ryl. 842.
S. C. 1 B. & C. 585.

7. If the clerk of the Commissioners of land-tax be improperly elected under 43 *Geo.* 3, c. 99, a *mandamus* will lie to the Commissioners to admit the person who has the majority of legal votes. *Rex* v. *Thatcher*, 1 Dow. & Ryl. 426.

8. A *mandamus* was granted to the Commissioners of an Inclosure Act, to inquire whether there was any *modus*. *Anonymous*, 2 Chit. 251.

9. A *mandamus* lies to a clergyman to replace a clerk of the parish; and the affidavit should state that such clerk was appointed for life, although it is not absolutely necessary. *Anonymous*,

2 Chit. 254.

10. The Court made a rule absolute in the first instance for a *mandamus* to an archdeacon to swear in the churchwarden duly elected. *Anonymous*,

2 Chit. 254.

11. A *mandamus* was issued to receive an appeal against overseers' accounts, though the allowance had not been previously made or examined at a special Sessions, pursuant to the statute 50 *Geo.* 3, c. 49, s. 1. *Rex* v. *Colchester* (*Justices*), 1 Dow. & Ryl. 146.
S. C. 5 B & A. 535.

12. By the statute 23 *Geo.* 3, regulating the affairs of the poor of *Birmingham*, the guardians and overseers thereby appointed, are directed to adjust their accounts at quarterly meetings of their own body; and an appeal is given to the Sessions in respect of all matters done by virtue thereof; but the statute is silent as to any submission of the overseers' and guardians' accounts to Magistrates, as required by 50 *Geo.* 3, c. 49:—Held, however, that a *mandamus* would lie from the Court of *King's Bench* to the guardians and overseers, to pass their accounts in the manner required by that statute. *Rex* v. *Warwickshire* (*Justices*),

2 Dow. & Ryl. 299.

13. A *mandamus* lies to Magistrates to summon a person for not paying poor-rates. *Anonymous*, 2 Chit. 257.

14. And the Court granted a rule *nisi* for a *mandamus* to pay poor-rates, though the defendants had had distrainable goods; it being sworn that the goods were fraudulently leased, and that the parish would be driven to try an action on the ground of the fraud. *Rex* v. *Margate Harbour* (*Company*).

2 Chit. 256.

15. The rule is absolute in the first instance for an inspection of the books of a corporation, where a *quo warranto* is depending. *Rex* v. *Travannion*,

2 Chit. 366.

II. ON WHAT GROUNDS REFUSED.

See *Rex* v. *Cambridge* (*Mayor*), 2 Chit. 144. Ante, page 82.

1. The Court will not grant a peremptory *mandamus* to reinstate a person in a corporate office, though the return made

to the writ may be objectionable or defective in point of form, if the facts stated on that return justify the Court in refusing the *mandamus* as matter of discretion;—such as to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner. *Rex* v. *Bristol (Mayor)*, 1 Dow. & Ryl. 389.
S. C. nomine Rex v. *Griffiths*, 5 B. & A. 731.

2. A *mandamus* will not lie to admit an inhabitant of a borough by prescription, to be a free burgess, unless it appear, first, that he had an inchoate right to be a free burgess; and secondly, that such office is a corporate office by prescription. *Rex* v. *West Love (Mayor)*, 2 Dow. & Ryl. 178.

3. The Court refused to fix any day for an election of burgesses and aldermen on a *mandamus*, but left it to the proper officer. *Rex* v. *Bridgwater (Mayor)*, 2 Chit. 256.

4. Where the owner of marsh lands was bound by the custom of a sewage level to repair the sea walls abutting on his own estate, and by an extraordinary flood-tide the wall was damaged;—the Court refused to grant a *mandamus* to the Commissioners of Sewers to reimburse him for the expense of the repairs, it appearing by affidavit that the wall had been previously presented as being out of repair, and was so at the time the accident happened. *Rex* v. *Essex Commissioners of Sewers*, 2 Dow. & Ryl. 700.
S. C. 1 B. & C. 477.

5. A *mandamus* will not lie to an Insurance Company to transfer shares standing in the name of a bankrupt into the names of his assignees. *Rex* v. *London Assurance Company*, 1 Dow. & Ryl. 510.
S. C. 5 B. & A. 899.

6. On a motion for a *mandamus*, the Court will not grant the writ where discretion was given to Commissioners under an Inclosure Act, and they had exercised it, and no ground was shewn that they had acted wrongfully. *Rex* v. *Flockwold Inclosure (Commissioners)*, 2 Chit. 251.

7. The Court refused to interfere by *mandamus* to compel a Court of inferior jurisdiction to grant a new trial in a cause before it, in which alleged injustice had been done to one of the parties. *Ex parte Morgan*, 2 Chit. 250.

8. In an action of debt in the Palace Court, the defendant having suffered judgment by default, that Court refused to allow the plaintiff to sign final judgment, as by law it was contended he might; and the Court of *King's Bench* refused a *mandamus* to compel the inferior Court to allow final judgment to be signed, leaving the plaintiff to his remedy by writ of error, where he had taken the necessary steps for that purpose. *Rex* v. *Conyngham (Marquis)*, 1 Dow. & Ryl. 529.
S. C. nomine Arden v. *Connell*, 5 B. & A. 885.

9. The Court refused to grant a *mandamus* to be directed to a dean to license a second curate. *Anonymous*, 2 Chit. 253.

10. And they refused a *mandamus* to churchwardens, to deliver a vestry-book to the vestry clerk. *Anonymous*, 2 Chit. 255.

11. And to certain persons to deliver up the keys of a church. *Anonymous*, 2 Chit. 255.

12. The Court will not grant a *mandamus* commanding Justices of the Peace to do an act which may render them liable to an action. *Rex* v. *Buckinghamshire (Justices)*, 2 Dow. & Ryl. 689.
S. C. 1 B. & C. 485.

13. Nor will they interfere to regulate the practice of Justices of a Court of Quarter Sessions, unless it appears to be manifestly wrong or unjust. *Rex* v. *Essex (Justices)*, 2 Chit. 385.

14. And a *mandamus* was refused to dismiss an appeal at the Sessions. *Rex* v. *Wilts (Justices)*, 2 Chit. 257.

15. A defendant having been convicted of forcibly passing a turnpike-gate without paying toll, the Sessions, on appeal, rejected evidence to shew that the gate had been unlawfully erected;—and the Court of *King's Bench* refused a *mandamus* to compel the Sessions to receive such evidence, the admissibility of it being exclusively a question for the Justices;—and the Court also refused to issue a *mandamus* to the Sessions to hear an original complaint, touching the conduct of the trustees in the erection of the gate, after a lapse of twenty-six years from the time when it was erected; leaving the party to proceed by indictment for the nuisance, or by an action of trespass, if his passage was obstructed. *Rex* v. *Cambridgeshire (Justices)*, 1 Dow. & Ryl. 325.

16. The statute 18 Geo. 3, c. 25, s. 5, gives an appeal to the Sessions against

the allowance by two Justices, of constables' accounts, "*in case the overseer or overseers* shall find that the parish or township is aggrieved thereby;" but the right of appeal cannot be exercised by one overseer without the consent of the majority:—Where, therefore, a township had four overseers and four churchwardens, and seven wished to allow constables' accounts against the sense of the eighth and a majority of the lay payers; and two Justices afterwards allowed the accounts:—Held, that the single overseer could not appeal against the allowance in his own name; and the Court refused a *mandamus* to the Sessions to hear the appeal. *Rex* v. *Manchester Justices*, 1 Dow. & Ryl. 454.

17. On the 20th *August*, two Justices removed a pauper from the parish of *A.* to the parish of *B.*—On the 5th *September* the churchwardens of *B.* gave notice of appeal to the Sessions, to be holden on the 17th *October*: on the 10th of that month the Justices made an order, superseding their former order of removal, upon doubts of its validity; which *supersedeas* was served on the parish officers of *B.*, who treated it as a nullity, and went to the Sessions, where the Justices refused to hear the appeal:—The Court refused to grant a *mandamus* to the Sessions to enter, hear, and determine it. *Rex* v. *Norfolk (Justices)*, 1 Dow. & Ryl. 69. *S. C.* 5 B. & A. 484.

18. A parishioner has no right to inspect parish books for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish; and therefore, the Court refused to grant a *mandamus* for that purpose. *Rex* v. *Smallpiece*, 2 Chit. 288.

19. And a *mandamus* will not lie to the lord and steward of a manor to inspect Court rolls, for the purpose of supporting an indictment against the lord for not repairing a road within the manor. *Rex* v. *Cadogan (Lord)*, 1 Dow. & Ryl. 559.

S. C. (differently reported,) 5 B. & A. 902.

III. WRIT, FORM OF.

1. If one parish officer applies for a *mandamus* against another to concur in a rate, the writ must be against the applicant as well as the other. *Anonymous*, 2 Chit. 254.

IV. RETURNS, HOW MADE.

See *Rex* v. *Bristol (Mayor)*, 1 Dow. & Ryl. 389.

S. C. nomine Rex v. *Griffiths*, 5 B. & A. 731. Ante. last page.

1. The Court will not direct in what manner Justices shall make their return to a *mandamus*; but if the return made to it be insufficient to raise the question intended to be agitated, the Court will, at the instance of the party interested, make a rule giving the Justices liberty to amend in the manner required, if they wish so to do. *Rex* v. *Marriott*, 1 Dow. & Ryl. 166.

2. A return to a *mandamus* commanding the defendant to take upon himself a corporate office;—that "by a bye law persons refusing to fill that office are subject to a certain fine, and that the defendant had paid such fine,"—is insufficient, as it did not state that the fine was to be in lieu of service. *Rex* v. *Bower*, 2 Dow. & Ryl. 842. *S. C.* 1 B. & C. 585.

3. Where, by the custom of a manor, persons not being previously customary tenants, or not dwelling in the manor, purchasing by surrender customary lands within the manor, were liable to pay a larger fine to the lord than tenants or inhabitants; and a person not being a tenant or inhabitant had purchased the equity of redemption in a customary estate, and in order to save the larger fine due in respect thereof, had subsequently become the purchaser of a smaller estate;—the Court granted a *mandamus* to the lord and steward to admit him to the latter; and as the return thereto did not allege any act of fraud in the transaction, the *mandamus* was made peremptory, although the effect of admittance to the smaller estate would be to defeat the lord's claim to the fine due upon the larger estate first purchased. *Rex* v. *Meer & Forton, (Mayor & Steward)*, 2 Dow. & Ryl. 824.

S. C. nomine Rex v. *Boughey*, 1 B. & C. 565.

MANOR.

COURTS AND CUSTOMS.

See also Ante. tits. { COPYHOLD. I. II. page 81. MANDAMUS. *passim.* }

1. A grant by royal charter empowered the steward and suitors of a manor to hold a Court for the determination of civil suits; and there had been a non-user of the Court for fifty years (except for the purpose of levying fines and suffering recoveries):—Held, that the Court being established for the public benefit, the words of permission in the charter were obligatory; and that the right of determining suits was not lost by the non-user. *Rex* v. *Havering-Atte-Bower (Steward, &c.)* 5 B. & A. 691.

See also *Rex* v. *Hastings (Mayor),* Id. 692. (*n.*)

2. An immemorial custom for the steward of a manor to *nominate* the Jury to serve on the Court-leet at the election of the mayor of a borough, is good in law. *Rex* v. *Jolliffe,* 3 Dow. & Ryl. 240. *S. C.* 2 B. & C. 54.

MARRIAGE.

See the Statutes 4 *Geo.* 4, c. 17. 4 *Geo.* 4, c. 76.
See also *Seymour* v. *Gartside,* 2 Dow. & Ryl. 55. Ante, page 27.

1. A marriage between two Protestant *British* subjects, solemnized by a *Portuguese* Catholic priest at *Madras* according to the rites of the Catholic church, followed by cohabitation, but without the license of the Governor, which it had been uniformly the custom to obtain, is a valid marriage. *Lautour* v. *Teesdale,* 8 Taunt. 830. *S. C.* 2 Marsh. 243.

2. And the validity of a marriage, celebrated in a foreign country, must be determined in an *English* Court, by the *lex loci* where the marriage is solemnized. *Lacon* v. *Higgins,* 1 Dow. & Ryl. N.P.C. 38.

MESNE PROFITS.

1. A joint action for *mesne* profits may be supported by several lessors of a plaintiff in ejectment, after a recovery therein; although there were only separate demises by each. *Chamier* v. *Klingon,* 2 Chit. 410.

MISNOMER.

1. If a defendant be arrested by the name of *Josiah* instead of *Josias,* the Court of C. P. will discharge him out of the custody of the sheriff, on his entering a common appearance, and undertaking to bring no action against the plaintiff or sheriff. *Johnson* v. *Cooper,* 5 Moore 472.

2. Upon error assigned of a *misnomer* of the Christian name of one of the plaintiffs below in the warrants of attorney:—Held to be immaterial. *De Tastet* v. *Rucker (in error),* 6 Moore 135. *S. C.* 3 Brod. & Bing. 65.

MONEY HAD AND RECEIVED.—See ASSUMPSIT, V. Ante. page 25.
MONEY PAID.—See ASSUMPSIT, IV. Ante. page 24.

MORTGAGE.

See *Hall* v. *Doe d. Surtees*, 1 Dow. & Ryl. 340. *S. C.* 5 B. & A. 687. Ante. page 139.
Anonymous, 2 Chit. 264. Ante. page 158.

1. In a Court of law, a mortgagor, in the actual possession of mortgaged premises, may properly be described as tenant of the mortgagee. *Partridge* v. *Bere*, 1 Dow. & Ryl. 272. *S. C.* 5 B. & A. 604.

2.* Where, under an indenture of lease from *A.* to *B.* for twenty-one years, at the rent of 50*l.*, *B.* by indenture assigned the lease to *C.*, to secure money previously advanced to him by *C.*, a great part of which was laid out by *B.* in repairing and improving the premises demised; and *C.* registered the assignment, but did not take the indenture of lease from *B.*, who afterwards gave up the indenture to *A.* in consideration of receiving a further advance from him of 200*l.*, to be expended in further improvements; and *A.* granted him a new lease, at the increased rent of 70*l.* a year; and *B.* afterwards again gave up that lease, on having another advance made to him of 200*l.* more by *A.*, and took a third lease from him at a rent of 90*l.*:—Held, on a motion for a new trial, (the plaintiff having recovered a verdict in an action of trover against the lessor and his attorney for the original lease,) that *C.* was not, under the circumstances, precluded by the neglect to take from *B.* the indenture of lease, from availing himself of the assignment against *A.*: and a rule to shew cause, obtained on the ground of the plaintiff's having, by leaving the indenture in the possession of the mortgagor, enabled him to practise a fraud, was discharged. *Bailey* v. *Fermor*, 9 Price 262.

But see *Goodtitle d. Norris* v. *Morgan*, 1 Term Rep. 755., which has been overruled in a Court of equity.

NEW TRIAL.

I. MOTIONS AND RULES FOR.

(*a*) *When and how made.*

For the Costs of a new Trial, see COSTS, VII. Ante page 87.

1. Where a bill of exceptions has been tendered, the Court will not grant a motion for a new trial, unless such bill has been abandoned. *Doe d. Roberts* v. *Roberts*, 2 Chit. 272.

2. Where an issue was sent from the Court of *Chancery*, the motion for a new trial may be made in the Court of *King's Bench;* the Judge at the trial having given leave to move. *Holworthy* v. *Richards*, 2 Chit. 270.

3. A defendant cannot move to enter a nonsuit unless leave be given at the trial, and can move only for a new trial: but if the Judge refused leave at the trial, because he thought it would be unnecessary, he will put the party in the same situation as if leave had been given at the trial. *Gates* v. *Ryan*, 2 Chit. 271.

4. Affidavits of facts, which might have been proved before the Jury, ought not, on principles of public policy, to be received or acted upon by the Court on motions for new trials; for the plaintiff in such a case, if his application were well founded, should have elected to have been nonsuited at the trial; as he cannot be permitted first to take the chance of a verdict by going to the Jury, and reserving to himself, in case of failure, an alternative in the experiment of an application to the Court for a new trial, on affidavits impugning the testimony of the defendant's witnesses. *Harrison* v. *Harrison*, 9 Price 89.

5. A new trial may be granted on payment of costs, where the verdict has been through the error of the Jury; but it is otherwise when through their misconduct, though an affidavit of such misconduct was produced when the rule *nisi* was moved for; yet, as it was not referred to in such rule, it cannot be made use of when the rule absolute is moved; for the rule *nisi* not being drawn up upon reading it, the other party had no notice of it. *Shillitoe* v. *Claridge*, 2 Chit. 425.

6. It may be made part of the rule for a new trial, that the Judge's notes of the evidence of an aged witness should be read in evidence in case he could not attend; but it is unnecessary for legal evidence between the same parties. 2 Chit. 425.

7. The Court of C. P. will not allow a rule for a new trial to be amended, by providing that the suit should not abate in the event of the death of the defendant, where a surety had previously entered into a bond for payment of the damages and costs of the second trial. *Lopes* v. *De Tastet*, 8 Taunt. 712.

II. IN WHAT CASES, AND ON WHAT TERMS GRANTED.

See *Trubody* v. *Brain*, 9 Price 76. Ante. page 87.

1. Where the plaintiff was nonsuited on the ground that there was no special memorandum affixed to the declaration, and the writ was not in Court to prove the commencement of the action, the cause of which accrued after the first day of Term; the Court granted a new trial on payment of costs. *Smith* v. *Cuff*, 2 Chit. 271.

2. Where a nonsuit was directed, on the ground that the notice of set-off gave sufficient intimation of the sum intended to be set off; and that if there had been no such notice, there would have been a good defence by proof of the demand being satisfied;—it was set aside, and a new trial granted. *Andrews* v. *Bond*, 8 Price 213.

3. Where a plaintiff had been nonsuited on the ground of a trifling variance between the contract set out, and that proved;—the Court granted a new trial, with leave to amend the declaration generally on payment of costs, reserving to the defendant leave to plead *de novo* or demur. *Williams* v. *Pratt*, 5 B. & A. 896.

4. A rule *nisi* for a new trial was granted where a witness was absent and called upon his *subpœna*, but did not appear until just before the verdict was taken. *Doe d. Clarke* v. *Trapand*, 2 Chit. 195.

5. So, on an affidavit by a material witness that he had made a mistake in giving his testimony,—the Court of C. P. granted a new trial. *Richardson* v. *Fisher*, 1 Bing. 145.

6. And the Court of *Exchequer* granted a new trial on the ground that the evidence of a witness on an issue directed to try a *modus*, who was lessee of the vicar disputing the existence of the *modus*, was improperly rejected. *Robinson* v. *Williamson*, 9 Price 136.

7. Where the plaintiff declared on three bills of exchange as distinct causes of action, in three several counts, but by his particular of demand confined his right to recover on the bill set forth in the first count only; and the defence was that the defendants were not partners when that bill was drawn; and the plaintiff offered in evidence the two other bills of a subsequent date, but drawn at the same place as the former, for the purpose of shewing a continuing partnership, which were rejected on the ground that they were not included in the particular;—that Court granted a new trial. *Duncan* v. *Hill*, 5 Moore 567.

8. Where, in replevin, the avowants proved an attornment made by the plaintiff after ejectment brought against him seven years before the commencement of the replevin suit, during which period it did not appear that the rent had been demanded; and the plaintiff offered to prove a feoffment to himself by the person under whom the avowants claimed; and certain letters, written by such person, containing expressions adverse to the avowant's claim, were rejected, on the ground that the plaintiff could not be permitted to dispute his tenancy after an attornment;—that Court granted a new trial. *Gravenor* v. *Woodhouse*, 1 Bing. 38.

9. Where the tenant of a house omitted to deliver up possession, his term having expired, after a regular notice to quit; and his landlord, in his absence, broke open the door and took possession; and some articles of furniture remained in the house; and the tenant obtained a verdict against the landlord in an action of

trespass for the entry;—that Court granted a new trial, on the ground that the landlord had a right of entry. *Turner* v. *Meymott*, 1 Bing. 158.

10. A new trial was granted, on the terms that the costs should abide the event, where the verdict of the Jury was perverse. *Hodgson* v. *Barvis*, 2 Chit. 268.

11. So, on payment of costs, where it is through the error of the Jury, but not for their misconduct. *Shillitoe* v. *Claridge*, 2 Chit. 425.

12. So, a new trial was granted on an affidavit by the defendant of surprise, and that he had a good defence; on the terms of his bringing money into Court, and that judgment should be given of the Term if the plaintiff obtained a second verdict; and that the defendant should pay the costs of the former trial forthwith, as well as the costs of the application for a new trial. *Greatwood* v. *Sims*, 2 Chit. 269.

13. In an action against a defendant (a third person), sued under the statute 11 *Geo.* 2, c. 19, s. 3, for double value, for assisting a tenant in carrying off and concealing his goods and chattels:—Held, that after a verdict for the defendant, the Court of *Exchequer* might notwithstanding grant a rule, calling on him to shew cause why there should not be a new trial, where the Jury had found for the defendant against the evidence reported to have been given in the cause. *Stanley* v. *Wharton*, 8 Price 301.

14. Where the plaintiff swore that hand-bills reflecting on his character had been distributed in Court, and shewn to the Jury at the trial, the Court of C. P. would not receive affidavits of the Jury in contradiction, but granted a new trial, although the defendant by affidavit denied all knowledge of the circulation or distribution of the hand-bills. *Coster* v. *Merest*, 3 Brod. & Bing. 272.

15. Where an action for a nuisance was defended by the landlord of the defendant, and the latter was told by the attorney employed by the landlord that he need not attend the trial; and the attorney entered into a consent rule to abate the nuisance without the consent of the defendant;—the Court of C. P. on affidavits shewing that the grievance complained of was not a nuisance, set aside an attachment which had issued on the consent rule, and granted a new trial. *Bodington* v. *Harris*, 1 Bing. 187.

III. ON WHAT GROUNDS REFUSED.

1. An indictment for perjury found against witnesses who gave evidence, is no ground for the Court to grant a new trial. *Pott* v. *Parker*, 2 Chit. 269.

2. And the mere contradiction of witnesses is not alone a sufficient ground for a new trial; although the Judge directed the Jury contrary to their finding. *Sprague* v. *Michell*, 2 Chit. 271.

3. Where a sheriff has taken possession of goods under a *fieri facias*, the officer should continue in possession; or, if he may abandon it even necessarily for a time, he must clearly and satisfactorily account for so doing, if he would sustain his right against other persons afterwards claiming under legal authority to seize the same goods; and in case of an abandonment on the return day of the writ, possession cannot afterwards be resumed: and the Jury having determined upon a question of abandonment, left to them on the evidence, the Court of *Exchequer* would not disturb that verdict. *Ackland* v. *Paynter*, 8 Price 95.

4. On an application for a new trial, on the ground that a witness who described himself by a false name at the trial, and was sworn on the New Testament as a Christian, was at that time a Jew and attended the synagogue:—Held, that the objection was too late; and that the oath, as taken, subjected the witness to the consequences of perjury, if he had sworn falsely. *Sells* v. *Hoare*, 3 Brod. & Bing. 232.

5. A client is bound by the conduct of his advocate; and the Court will not grant a new trial on the ground that the witnesses were not examined by counsel according to the request of the attorney engaged in the cause. *Hall* v. *Stothard*, 2 Chit. 267.

6. The Court of *Exchequer* refused to grant a rule *nisi* for a new trial, where a person (not originally intended to be examined) who was in Court, and who had been there during the trial, was called to give evidence, and was not allowed to be examined on that ground. *Attorney-General* v. *Bulpit*, 9 Price 4.

7. Although a witness proves a fact to the surprise of the other party, and though by mistake he was not cross-examined, nor was any evidence given to contradict him, or any observation made on his evidence, it is no ground for a new trial. *Bell* v. *Thompson*, 2 Chit. 194.

8. If a person commit an injury by unavoidable accident, no action is maintainable; but where any blame attaches to him, although he be innocent of any intention to injure,—as, if he drives a spirited horse improperly, or uses imperfect harness, and the horse takes fright and kills another,—an action lies; and where a verdict was found for the plaintiff in trespass for killing his horse by the improper driving of the defendant, the Court of C. P. refused to grant a new trial; although the Judge, after summing up the evidence, told the Jury that the defendant was liable even though the accident was unavoidable and no blame was imputable to him, omitting to direct them to consider whether the accident was unavoidable or not. *Wakeman* v. *Robinson*, 1 Bing. 213.

9. Where, in an action for a libel on the plaintiff in his avocation as an exhibitor of sparring-matches at the *Tennis Court*, of which he was the proprietor, the Jury were directed to consider whether such exhibitions were not illegal, as tending to form and encourage prize-fighters; and they having found in the affirmative, and in concurrence with the opinion of the Judge at the trial, the Court of C. P. refused to grant a new trial. *Hunt* v. *Bell*, 1 Bing. 1.

10. After a verdict for the defendant in a penal action, the Court will not grant a new trial, where the verdict was contrary to the Judge's direction, and founded on a mistake, if there has been no misconduct in the Jury. *Rauston* v. *Etteridge*, 2 Chit. 273.

11. Where a cause was set down in the written list at *Nisi Prius*, and taken out of its turn as an undefended cause, and was tried as such, in the absence of the defendant's counsel and attorney, who were instructed to defend;—the Court refused to grant a new trial, though moved for on payment of costs, without an affidavit of merits. *Blackhurst* v. *Bulmer*, 1 Dow. & Ryl. 553. *S. C.* 5 B. & A. 907.

12. The Court of *Exchequer* will not grant a new trial on the ground of surprise, where the plaintiff applies on an affidavit, stating that the defendant's witness has sworn falsely to an acknowledgment by the plaintiff that he had received money of the defendant, and imputing perjury in that and other respects to the defendant's witnesses, and an avowal of it after the trial. *Harrison* v. *Harrison*, 9 Price 89.

13. An admission by Jurymen, that the verdict was given by mistake, made after they have separated, though on the day of trial, is not a sufficient ground for a new trial. *Davis* v. *Taylor*, 2 Chit. 268.

IV. IN CRIMINAL CASES.

(*a*) *When and how obtained.*

See *Attorney-General* v. *Bulpit*, 9 Price 4. Ante. last page.

1. Affidavits of new facts are not in general admissible in criminal cases, on a motion for a new trial, unless there was some surprise on the defendant at the trial: but affidavits of the death of a person may be received to account for his not having been examined as a witness. *Rex* v. *Bowditch*, 2 Chit. 278.

2. A new trial was refused after a verdict of not guilty, upon an indictment for not repairing a road, where the verdict did not bind the right. *Rex* v. *Burbon (Inhab.)*, 5 M. & S. 392.

3. Though the Court will not grant a new trial on an indictment where the verdict was given for the defendant, yet they will stay the entry of judgment on a former verdict, to prevent the plea of *autrefois acquit*, on a fresh trial. *Rex* v. *Wandsworth (Inhab.)*, 2 Chit. 282.

4. It seems that the consent of the counsel for the prosecution cannot dispense with the rule which requires the presence of defendants convicted upon a criminal proceeding, during a motion for a new trial. *Rex* v. *Fielder*, 2 Dow. & Ryl. 46.

NON-RESIDENCE.—See Post. tit. VENUE.

OFFICERS.

I. PUBLIC.

(a) *Privileges of.*

For the Notice of Action required to be given to Magistrates, see ACTION, IV. (*b*), Ante. page 4.
See also ACTION, VI. Ante. page 5.
Ante. tit. CONSTABLE, page 79.
And *Willard* v. *Moss*, 1 Bing. 134. Post. tit. PRIZE-MONEY.

1. An action cannot be maintained against a public officer,—for instance, the secretary at war, for allowances which, as such public officer, he is authorized to pay by the appropriation acts, to certain retired inferior officers for past services, although he may have received the money applicable to such specific purposes. *Gidley* v. *Palmerston (Lord)*, 3 Brod. & Bing. 275.

II. OF THE COURTS OF JUSTICE.

(a) *Powers, Duties, and Fees of.*

1. In order to prevent the fraudulent issuing of any writ of execution without a judgment to support it, it was ordered that the sealer of the writs of the Court of *King's Bench* shall not seal any writ of *fieri facias* or *capias ad satisfaciendum*, without having the judgment paper, *postea*, or inquisition produced to him. *Reg. Gen.* H. T. 1822.
1 Dow. & Ryl. 471.
5 B. & A. 560.
2 Chit. 377.

And see also tit. COGNOVIT. Ante. page 77.

2. The word *householder* does not mean a personally resident housekeeper within the statute 26 *Geo.* 3, c. 38, s. 8.:—Held, therefore, where a person had been elected to the office of registrar and clerk of the Court of *Requests* of the city of *Bristol*, by a majority of householders paying rent, rates, and taxes, and resident by their partners in trade or their servants only, that the election was valid. *Rex* v. *Hall*,
2 Dow. & Ryl. 241.
S. C. 1 B. & C. 123.

3. An order drawn up in the name of the Court by an officer of a Court of justice,—for instance, the clerk of the Insolvent Debtors' Court,—is until amended, repudiated, or rescinded, the order of the Court. *Whitelegg* v. *Richards*,
6 Moore 501.
S. C. 3 Brod. & Bing. 188.
But see *contra*, *S. C. (in error)*,
3 Dow. & Ryl. 237.
2 B. & C. 45.

4. By the statute 1 *Geo.* 4, c. 35, an Accountant-General and two Masters, who were to attend in person and take minutes, &c., were appointed by the Court of *Exchequer*; and by the 21st section of that statute, the Lord Chief Baron was empowered to appoint a clerk of the Reports. 8 Price 493-9.

5. And that Court afterwards made a general order as to the fees to be taken by those officers. 8 Price 699.

6. The anniversary of the King's accession is not a holiday. *Memorandum*,
9 Price 13.

7. And on the anniversary of the martyrdom of *Charles* the First, the junior Baron of the Court of *Exchequer* will in future sit in the morning to take motions of course. *Memorandum*,
9 Price 15.

8. The clerk of the dockets is not entitled to poundage on money paid into Court by a sheriff, under the statute 43 *Geo.* 3, c. 40, s. 2. *Hunn* v. *Brine*,
6 Moore 124.

9. But the clerk of the papers in the *Fleet* prison is entitled to a fee of 2*s.* 6*d.* on every action from which a prisoner is discharged, and which is payable under the rule of Court, *Easter Term*, 13 *Geo.* 1. *In re Rochfort*, 1 Bing. 255.

III. REVENUE.

(a) *Privileges of.*

For the Notice of Action, see tit. ACTION, V. Ante. page 4.
See also *Crook* v. *M'Tavish*, 1 Bing. 167.
Ante. page 181.
Norton v. *Miller*, 2 Chit. 140.
Ante. page 79.

1. The Court of *Exchequer* will remove an action brought in another Court against an officer of excise for refusing to accept the duty on goods

warehoused, and to grant the usual certificate, where part of the goods having been afterwards seized, and an information for their condemnation is depending in that Court; and they will order the trial of the action removed to wait the result of the trial of the information. *Beningfield* v. *Stratford*, 8 Price 584.

OFFICES.

1. The annual Indemnity Act, 4 *Geo.* 4, c. 1, for indemnifying such persons as have omitted to qualify themselves for offices, is prospective as well as retrospective, and extends to those who may be in default during the time for which it is made, and is not limited to those who had incurred penalties or disabilities before it passed. *In re Steavenson*, 2 B. & C. 34.

2. An assignment by deed to trustees, of all the income, emoluments, and profits, which, during the life of the assignor, and his continuing to hold the office of clerk of the peace for *Westminster*, should arise or become due to him as such clerk in respect of his office, (after deducting the salary or allowance of his deputy for the time being,) upon trust, to pay interest which should become due to *A.* and *B.* on certain debts due from the assignor to them, and from time to time render and pay the surplus and residue of the income, emoluments, and profits to the assignor, after satisfying the trusts, is not a good or effectual assignment, nor valid in law; and the trustees are not entitled to receive such income and profits under such assignment. *Palmer* v. *Bate*, 6 Moore 28.

3. The office of private secretary does not fall within the meaning of the statute 5 & 6 *Edw.* 6:—Therefore, an assignment of the profits of all offices which the defendant might acquire, is good as to all those which may be legally assigned. *Harrington* v. *Klopreage*, 6 Moore 31. (*n.*) *S. C.* 2 Chit. 475.

4. Payment of a fine imposed by the bye laws of a corporation for refusing to accept a corporate office, does not exempt the party elected from serving such office. *Rex* v. *Bower*, 2 Dow. & Ryl. 842. *S. C.* 1 B. & C. 585.

OUTLAWRY.

PROCEEDINGS TO, WHERE REGULAR.

See *Bonner* v. *Wilkinson*, 1 Dow. & Ryl. 328. *S. C.* 5 B. & A. 682. Ante. page 123.

1. The writ of *exigent* upon an outlawry must be in the hands of the sheriff at the time the defendant is demanded:—Where, therefore, the sheriff returned to a writ of *exigent*, and to a writ of *allocatur exigent*, that he had demanded the defendant at the hustings upon five several days, when out of four of the five the writs could not by possibility have been in his possession:—Held, that the returns were irregular. *Volet* v. *Waters*, 3 Dow. & Ryl. 55.

2. It seems also, that the writ of proclamation upon an outlawry is void, unless the requisites of the statute 31 *Eliz.* c. 3, s. 1, are duly complied with. 3 Dow. & Ryl. 55.

PARTICULARS OF RESIDENCE AND DEMAND.

1. In a joint action for a libel by three plaintiffs, the defendants may call on the attorney of one of them for an account of the residence or occupation of the others. *Worton* v. *Smith*, 6 Moore 110.

2. So, in trespass for an assault, the Court compelled the plaintiff to disclose

his proper addition and place of residence to the defendants, his identity being material to their defence at the trial. *Johnson* v. *Birley*, 5 B. & A. 540.
S. C. 1 Dow. & Ryl. 174.
See also *Taylor* v. *Harris*.
4 B. & A. 93.

3. Defendants, on being served with process, or arrested, will be allowed to obtain orders for the particulars of the plaintiff's demand, without waiting till appearance entered, or bail put in, or declaration filed and delivered; and in this respect the practice of the Court of C. P. will in future be made conformable to that of the Court of *King's Bench*. *Rule of Practice*, T. 2 *Geo.* 4, 6 Moore 211.

4. Where the plaintiff declared on three bills of exchange, as distinct causes of action, in three several counts, but by his particular of demand confined his right to recover on the bill set forth in the first count only; and the defence was, that the defendants were not partners when that bill was drawn; and the plaintiff offered in evidence the two other bills of a subsequent date, but drawn at the same time as the former, for the purpose of shewing a continuing partnership, which were rejected on the ground that they were not included in the particular;—the Court of C. P. granted a new trial. *Duncan* v. *Hill*, 5 Moore 567.

PARTNERS.

I. PARTNERSHIP, HOW CONSTITUTED.

1. A number of persons associating together, and subscribing sums of money for the purpose of obtaining a bill in Parliament to make a railway, are partners in the undertaking. *Holmes* v. *Higgins*, 6 B. & A. 74.
S. C. not (*S. P.*) 2 Dow. & Ryl. 196.

2. But where two persons contracted to assist the defendant with their respective horses, but to give in their accounts separately:—Held to be separate contracts. *Smith* v. *Taylor*, 2 Chit. 142.

3. *A.* being established in trade, and wishing to increase his capital, entered into a deed of co-partnership with *B.* for ten years, who advanced 20,000*l.*, upon a covenant that he should receive 2000*l.* *per annum* during the partnership, out of the profits, if there were any; and if none, out of the capital: that he should not be answerable for any losses or expenses incident to the concern, and that the business should be carried on in the name of *A.* only; that at the end of the ten years, if the partnership determined by efflux of time, he should be repaid the 20,000*l.* by instalments at three months' date, bearing legal interest; and that if default should be made in the annual payment of 2000*l.*, or the joint capital should be at any time reduced to 20,000*l.*, then he should be at liberty to terminate the partnership, and repay himself the 20,000*l.* advanced, immediately. *B.* brought an action of covenant in the Court of C. P., and recovered judgment and damages for the non-payment of the 20,000*l.* at the end of the ten years, the Jury expressly negativing usury; and a writ of error being afterwards brought in the Court of K. B.:—Held, that upon the face of the deed *A.* and *B.* were partners, and judgment was affirmed. *Gilpin* v. *Enderby (in error)*, 1 Dow. & Ryl. 570.
S. C. 5 B. & A. 954.

And see *Gilpin* v. *Enderby*, 5 Moore, 571. Post. tit. USURY.

II. ACTS OF PARTNERS, IN WHAT CASES BINDING, AND LIABILITY OF TO THIRD PERSONS.

1. One partner may act for the whole firm by *procuration. Williamson* v. *Johnson*, 1 B. & C. 146.
S. C. (not *S. P.*) 2 Dow. & Ryl. 281. Ante, page 68.

2. Where the member of a country bank signed promissory notes for himself and partners, beginning with the words, "I promise to pay:"—Held, that he made himself severally liable upon the notes, and could not plead in abatement a joint liability with his co-partners. *Hall* v. *Smith*, 2 Dow. & Ryl. 584.
S. C. 1 B. & C. 407.

3. Where the plaintiff kept a general account with *A.* as his banker and army agent, and *B.* became a partner with *A.* for a limited period, and retired on its expiration, without the knowledge of the plaintiff; and *A.* afterwards became bankrupt, until which period the account continued between the plaintiff and *A.*:—Held, that payments made by the latter to the plaintiff after the expiration of the partnership, not having been appropriated by him at the time to any particular debt, *B.* might consider such payments as being made in reduction of the balance due at the expiration of the partnership; and that he was not accountable to the plaintiff for any sum received by *A.* on account of the latter, subsequent to such expiration. *Brooke* v. *Enderby*, 4 Moore 501.

III. RIGHTS, DUTIES, AND LIABILITIES OF, ON AND AFTER DISSOLUTION.

1. Notice of the dissolution of a partnership in the Gazette, is notice to all the world. *Wright* v. *Pulham*, 2 Chit. 121.

2. If an indenture of partnership for a term of years contain a proviso, that either party may, if he be desirous of quitting the trade, determine the partnership by giving six months' notice; he cannot dissolve the partnership and then set up a trade elsewhere, but must either continue the partnership, or give up such trade altogether. *Cooper* v. *Watlington*, 2 Chit. 451.

3. By a deed of dissolution of partnership, a power was reserved to the remaining partners, to use the name of the retiring partner in the prosecution of all suits for the recovery of partnership debts. In an action where judgment had been obtained by all the partners previously to the dissolution:—Held, that the remaining partners were authorized, under the power in the deed, to give the defendant a note for the payment of the sixpences, under the Lord's Act, on behalf of themselves and the retiring partner. *Burton* v. *Issitt*, 5 B. & A. 267.

4. A party is liable on a promissory note made in the name of the firm in which he had been a partner, though it was drawn after the dissolution of the partnership, he having suffered his name to continue in the firm, and although the plaintiff knew that fact at the time he took the note. *Brown* v. *Leonard*, 2 Chit. 120.

5. But a bill drawn and accepted after the dissolution of a partnership, though dated before, does not bind the other partners. *Wright* v. *Pulham*, 2 Chit. 121.

6. *F.* sold goods to *H.*, *S.*, and *P.*, who were partners in trade, and received a bill of exchange for the amount, payable to his own order, drawn by *S.* and *P.* upon *H.* which was not accepted. *H.*, *S.*, and *P.* dissolved partnership before the bill became due, and at the time of the dissolution had sufficient assets to pay all partnership debts; *S.* and *P.* then entered into a fresh partnership with two other persons, and carried on trade at *Newfoundland*, where the old firm had an establishment, and were there possessed of considerable property, which was sold to the new firm. *F.* the holder of the bill, delivered it to *P.* to procure payment of it out of the assets of the old firm at *Newfoundland;* and *P.* in the adjustment of partnership accounts with *H.*, expressly debited the latter with the amount of the bill, as having been paid out of the funds of the old firm; but the bill, which was never cancelled, was returned again to *F.*, who sued *H.*, *S.*, and *P.* upon it. *S.* and *P.* who had in the mean time become bankrupts, suffered judgment by default:—Held, that *F.* had not so dealt with his debt as to discharge the liability of *H.* *Featherstone* v. *Hunt*, 2 Dow. & Ryl. 233.
S. C. 1 B. & C. 113.

IV. BANKRUPTCY, EFFECT OF.

1. Where one of two partners in trade had, after an act of bankruptcy, accepted a bill of exchange in the name of the firm, without the privity of his co-partner:—Held, that in the hands of an innocent indorsee it was an available security. *Lacy* v. *Woolcott*, 2 Dow. & Ryl. 458.

2. Where one of two partners, who were country bankers, became bankrupt, and the defendants, being holders of their notes, obtained payment of part of them from the *London* banker, at whose house they were payable, out of the funds in their hands belonging to the country bank; and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to the defendants, in payment of the residue of the notes in their hands, and afterwards became bankrupt:—Held, that the assignees could not recover from the defendants the money so paid to them by the *London* banker, nor the proceeds of the bill. *Harvey* v. *Crickett*, 5 M. & S. 336.

3. Where the plaintiff and a bankrupt, before the bankruptcy, being partnership brokers, effected an insurance for the defendants, and the receipt of the premium was acknowledged in the policy at the time of effecting such insurance, but which was not in fact paid until after the plaintiff's partner's bankruptcy, by the plaintiff out of his own separate property;—the principal insured was held liable to the solvent partner only. *Thacker* v. *Shepherd*, 2 Chit. 652.

V. PROCEEDINGS IN ACTIONS BY AND AGAINST.

1. The payment of money to the defendant's use by a solvent partner, out of his separate property after the bankruptcy of his partner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner. *Thacker* v. *Shepherd*, 2 Chit. 652.

2. Where a partnership between two persons in trade had been dissolved, and one of them carried on business afterwards solely on his own account, but in the names of himself and former partner:—Held, that he might maintain *assumpsit* alone for goods sold and delivered to the defendant during the existence of the partnership. *Atkinson* v. *Laing*, 1 Dow. & Ryl. N.P.C. 16. *Sed Quære?*

3. A number of persons associating together, and subscribing sums of money for the purpose of obtaining a bill in Parliament to make a railway, are partners in the undertaking; and therefore a subscriber, who acted as their surveyor, cannot maintain an action for work done by him in that character on account of the partnership, against all or any one of the other subscribers. *Holmes* v. *Higgins*, 6 B. & A. 74. S. C. (not S. P.) 2 Dow. & Ryl. 196.

VI. PLEADINGS AND EVIDENCE.

See *Fitzgerald* v. *Boehm*, 6 Moore 332. Ante, page 23.

1. A demand against a surviving partner as survivor, may be joined with a demand due from him, as if he were solely liable. *Golding* v. *Vaughan*, 2 Chit. 436.

2. Where *A.* covenanted with *B.* on the dissolution of partnership, to leave 150*l.* in a banker's hands till *March* 1822, as a security towards payment of any demands which might be made on *A.* in respect of debts contracted by *B.*, on account of the credit of the partnership; and that the sum, after that period, should be paid over to *B.*, subject to such claims as might have been made as aforesaid.—Breach, that though *B.* had contracted no such debts as aforesaid, and though no claim had been made, *A.* prevented the banker from paying the said sum over to *B.* after *March* 1822:—Plea, that a claim or demand was made on *A.* in respect of a debt of 200*l.* by one *T. H.* as being a debt contracted by *B.* on account of the credit of the said partnership:—Held, that such plea was bad on demurrer. *Want* v. *Reece*, 1 Bing. 18.

3. In an action against three defendants as partners, the office copy of an answer to a bill in *Chancery*, filed by one against the others, is admissible in evidence, without producing the original, in order to establish the partnership; and to prove the identity of the defendants, the clerk of their solicitor is a competent witness to that fact, though he knows nothing of the defendants but from his intercourse with them professionally in

the conduct of the suit in *Chancery*. *Studdy* v. *Sanders*, 2 Dow. & Ryl. 347.

4. On an issue as to the liability of defendants as partners, an attorney *subpœnaed* to produce a composition deed, executed between them and another firm, shewing the partnership, may object to the production of the instrument, on the ground that the disclosure of its contents may prejudice the latter, in disputes with other persons. *Harris* v. *Hill*, 1 Dow. & Ryl. N.P.C. 17.

PATENT.

1. Where a patent was obtained, for "a new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, without any starch whatever," and the specification described the invention to consist in an improved texture or mode of twisting the threads, to be applied to the making of unstarched cloth;—on its being proved at the trial that the exclusion of starch had been before adopted:—Held, that such patent was void, as being taken out for more than the patentee had really discovered. *Campion* v. *Benyon*,
6 Moore 71.
S. C. 3 Brod. & Bing. 5.

PAVING ACTS.

CONSTRUCTION OF.

1. Where the 22 *Geo.* 3, c. 84, (the Paving and Lighting Act for the parish of *St. George, Hanover Square*,) prescribed a particular remedy for an offence, it does not necessarily take away the parties' remedy by action; and where the Act prohibited other persons than the scavenger from carrying away dust from houses in certain places, under a penalty of 10*s*. to be recovered before a magistrate:—Held, that the scavenger might still have his remedy for an injury in this respect by action. *Ward* v. *Bird*,
2 Chit. 582.

2. By the *Manchester* and *Salford* Paving and Lighting Act, 32 *Geo.* 3, c. 69, the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coachhouses, brewhouses, and other buildings, gardens, or garden ground, and other *tenements* within the same towns, are liable to be rated for the purposes of the Act:—Held, that under such Act, the *Manchester* and *Salford* Waterworks Company are not rateable as occupiers of a *tenement*, in respect of their water-pipes carried under ground, for supplying those towns with water. *Rex* v. *Manchester Waterworks* (*Company*,)
3 Dow. & Ryl. 20.
S. C. 1 B. & C. 630.

PAWNBROKER.

1. A person who had formerly taken in goods on pledge, and had ceased to do so, but continued to sell the unredeemed pledges, still carries on the trade of a pawnbroker, and is subject to the bankrupt laws as such. *Rawlinson* v. *Pearson*, 5 B. & A. 124.

2. The general Pawnbrokers' Act, 39 & 40 *Geo.* 3, c. 99, s. 17, declares that goods which are pledged and not redeemed within a year after the day of pledging, shall be forfeited, and may be sold by the pawnbroker:—Held, that where the plaintiff had pawned a watch, and after the year had expired, tendered the money lent and interest to the pawnbroker, and he refused to deliver it up; the plaintiff might maintain trover, not having forfeited his title to the goods by reason of the 17th section of that statute. *Walter* v. *Smith*, 1 Dow. & Ryl. 1.
S. C. 5 B. & A. 439.

PAYMENT.

GENERAL PAYMENTS, HOW APPLIED.

See *Fisher* v. *Miller*, 1 Bing. 150. Ante, page 56.

1. Where the plaintiff kept a general account with *A.*, as his banker and army agent, and *B.* became a partner with *A.* for a limited period, and retired on its expiration without the knowledge of the plaintiff; and *A.* afterwards became bankrupt, until which period the account continued between the plaintiff and *A.* alone:—Held, that payments made by the latter to the plaintiff after the expiration of the partnership, not having been appropriated by him at the time to any particular debt, *B.* might consider such payments as being made in reduction of the balance due at the expiration of the partnership; and that he was not accountable to the plaintiff for any sums received by *A.* on account of the plaintiff, subsequent to such expiration. *Brooke* v. *Enderby*, 4 Moore 501.

2. *A.* and *B.* severally kept cash at the same banking-house; and on the 13th *November*, *A.* paid in a draft for 250*l.* drawn by *B.* in favour of the former, upon the bankers, to whom the latter was considerably indebted. The draft was received by the bankers' clerk without any thing being said respecting it, or any entry made of it in their books. In the course of the same day the bankers discounted bills for *B.* to the amount of 1600*l.*, the produce of which he expressly appropriated to the charges of the day, consisting of bills accepted by him for 1342*l.*; two drafts for 50*l.* each given to other persons; and the draft for 250*l* in favour of *A.*, which was presented before the latter drafts. The bills and the two 50*l.* drafts were paid by the bankers on the same day, leaving a balance only of 137*l.* in their hands. On the morning of the 14th they wrote a letter to *A.*, stating that they had not carried the draft for 250*l.* to his credit, but that they would "keep it by them in the hope of its being provided for;" and they promised *B.* that they would pay it when they had funds. On that day the bankers discounted other bills for *B.* to the amount of 699*l.*, the produce of which he specifically appropriated to claims upon him amounting to 599*l.*; after which an unappropriated balance of 93*l.* remained in the bankers' hands:—Held, that they were liable to *A.* for the whole amount of the 250*l.* draft in an action for money had and received, though they had not at any moment an unappropriated sum in their hands sufficient to cover the draft. *Kilsby* v. *Williams*,
1 Dow. & Ryl. 476.
S. C. 5 B. & A. 815.

3. *A.*, *B.*, and *Co.*, country bankers, had a cash account with *C.* & *Co.*, *London* bankers, who were in the habit of transmitting to the former monthly statements of mutual debts and credits. *A.* died, leaving a large balance due from himself and *B.* & *Co.* to *C.* & *Co.*, who for two months afterwards made no alteration in their *own* books as to the mode of keeping the account, but continued it as before. In the interval, money was transmitted to *C.* & *Co.* from the country bank, sufficient to pay off the balance due from the firm at the time of *A.'s* death. During the two months, no accounts were transmitted to the country bank; but at the end of that time two separate accounts were sent, one called the old account, made up to the death of *A.*, without giving credit for the money received since his death, in liquidation of the balance at that time due from the firm; and the other called the new account, comprising the two months, giving credit for the sums received during that period. In an action by *C.* & *Co.* on a joint and several indemnity-bond given by *A.* and *B.* against the heirs of *A.*, for the balance due at his death:—Held, that *C.* & *Co.*, by continuing their own private account against *A.* and *B.* for two months after the death of *A.* as theretofore, were not estopped from suing his heirs, as the entries in their books did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it: and therefore, that notwithstanding those entries, they were entitled to apply the payments received subsequently to the death of *A.* to the debt of the new firm. *Simson* v. *Ingham*,
3 Dow. & Ryl. 249.
S. C. 2 B. & C. 65.

4. A direction by a debtor to his bankers, who were indebted to him in a larger amount, to place to the credit of his creditor (a debtor to the bankers),

for goods sold, a sum of money, so as to make the same as a bill at one month; which the bankers consented to do, but who only considered it as a payment to be made at a future day,—does not amount to a payment: and the bankers having become bankrupts before the day on which the credit would expire:—Held, that the debtor was not discharged by such payment. *Pedder* v. *Watt*, 2 Chit. 619.

PAYMENT OF MONEY INTO COURT.

For Costs on payment of money into Court, see tit. Costs. V. Ante. page 86.
See also Ante. tit. Officer.

1. A separate commission having been sued out against *A.*, and a joint commission having also issued against him and *B.*, and the assignees under the separate commission having recovered a verdict in trover against *C.*; the Court ordered the amount of the verdict to be brought in to abide the event of a petition to the *Chancellor* to supersede such separate commission. *Hodgkinson* v. *Travers*, 2 Dow. & Ryl. 409. *S. C.* 1 B. & C. 257.

2. Payment of money into Court upon a special contract, admits the contract, and concludes the defendant from impeaching its existence;—Where, therefore, a declaration by a landlord against his tenant, averred that the latter became tenant to him of certain messuages from year to year, under a certain rent, payable half-yearly; and that the tenant undertook that he would, during the continuance of the tenancy, keep the messuages in repair, and would pay rent during the continuance of the tenancy: and alleged as breaches in the first count, that the premises were not kept in tenantable repair; and in the second, first, non-repair, and second, non-payment of rent: and the tenant having pleaded the general issue, and paid half a year's rent into Court *under the second breach*:—Held, that such payment admitted the whole of the contract. *Dyer* v. *Ashton*, 2 Dow. & Ryl. 19. *S. C.* 1 B. & C. 3.

3. Where a defendant, on being arrested, deposited certain goods in the hands of the officer in lieu of bail, and eight days after the process was returnable surrendered himself; two days after which the officer who arrested him paid into the hands of one of the Prothonotaries a certain sum as the amount of the debt, and 10*l.* for the costs, in lieu of bail, under the statute 43 *Geo.* 3, c. 46.:—Held, that the defendant was afterwards entitled to take it out of Court, as it had been paid in under a mistake. *Hill* v. *Chinn*, 1 Bing. 103.

PEER.

1. A declaration in case against an *Earl*, stating him to have been "*summoned* to answer," instead of "*attached*," is bad. *Hunter* v. *De Loraine (Earl)*, 2 Chit. 638.

PENAL ACTION.

See also tits. { Amendment. VIII. Ante. page 14. Bribery. Ante. page 72. Paving Acts. Ante. page 196. }

1. The consent of the party to whom the moiety of a penalty is to be paid, (he not being the plaintiff,) is not necessary in prosecuting a penal action, and the want of it is no ground for staying proceedings. ——— v. *Smith*, 2 Chit. 392.

2. The statute 31 *Eliz.* c. 5, which relates to cases where the *venue* shall be laid in penal actions, extends as well to offences of omission as commission. *Whitehead* v. *Wynn*, 5 M. & S. 427.

PENAL STATUTES.

I. RULES AS TO CONSTRUCTION OF.

(*a*) *Public Employments abroad.*

1. The statute 42 *Geo.* 3, c. 85, for trying and punishing in this country persons holding public employments, for offences committed abroad, does not extend to felonies. *Rex* v. *Shawe*; 5 M. & S. 403.

(*b*) *Stage Entertainment.*

1. It seems that public exhibitions of sparring-matches are illegal; and that the proprietor of a public place, where such exhibitions are allowed, has no remedy by an action at law for a libel regarding his conduct as such proprietor. *Hunt* v. *Bell*, 1 Bing. 1.

PERJURY.

See the Statute 3 *Geo.* 4, c. 81.
See also tit. INDICTMENT. IV. Ante. page 154

1. Where perjury was assigned on evidence given before the sheriff's secondary on an inquisition of damages, where the writ of inquiry was directed to be returned into C.P. instead of K.B. :—Held, that an indictment would lie upon the alleged perjury. And where, in an action on the case for a malicious prosecution for perjury, assigned on evidence given under such circumstances, it was held to be no objection in arrest of judgment, although the count did not set out any indictment. *Pippet* v. *Hearn*, 1 Dow. & Ryl. 266. *S. C.* 5 B. & A. 634.

2. Where an information for perjury, committed before a select committee of the House of Commons, appointed to try and determine the merits of an election, averred, that the committee was appointed for that purpose; and that they were sworn "to try the matter of the petition," &c. :—Held, that the situation of the committee was well described to support the averment, although described in the statute 10 *Geo.* 3, c. 16, s. 13, as a select committee "to try and determine the merits of the return or election." *Rex* v. *Dunn*, 1 Dow. & Ryl. 10.

3. An information for perjury, charging that the defendant, before a committee of the House of Commons, being duly sworn, "knowingly and deliberately, and of his own act and consent, did depose and swear" to certain facts set forth in the information; and that he afterwards, at the bar of the House of Lords, being duly sworn, "knowingly, &c. did swear" to certain facts contradicting what he had previously sworn before the Committee of the House of Commons; with a conclusion, "and so the defendant, in manner and form aforesaid, did commit wilful and corrupt perjury,"—cannot be sustained, and is bad in arrest of judgment. *Rex* v. *Harris*, 1 Dow. & Ryl. 578. *S. C.* 5 B. & A. 926.

4. The Court will only under particular circumstances grant a view in an indictment for perjury; and will not do so, if there be any risk of its misleading the Jury. *Anonymous*, 2 Chit. 422.

PEW.

1. An action at common law cannot be maintained for disturbing another in the possession or enjoyment of a pew, unless it be annexed to a house or some other messuage in the parish. *Mainwaring* v. *Giles*, 5 B. & A. 356.

PILOTS.

1. An *Irish* vessel with a general cargo, trading between *Belfast* and *London*, and not laden with corn or grain, as specified in the 46 *Geo.* 3, c. 97, s. 2, is not exempted under the 52 *Geo.* 3, c. 39, s. 2, from taking a pilot on board, as such vessel ca. not be considered as a coasting vessel, or an *Irish* trader, using the navigation of the river *Thames* as a coaster. *Davison* v. *Mekibben*, 6 Moore 387. *S. C.* 3 Brod. & Bing. 112.

2. And in an action against the master of a vessel for penalties under the 34th section of the latter statute, the declaration must allege that a licensed pilot had offered the master to take charge of the vessel, or made such offer in his presence or hearing; and it is not sufficient merely to follow the general words of the Act:—it seems also necessary to state when such offer was made. *Peake* v. *Carrington*, 5 Moore 176.

PLEADING.

[N.B. *For the several Cases which may be considered as applicable to this head, see the Table of Titles prefixed to this Digest, where they are alphabetically arranged, and are consequently distributed under the respective titles to which they belong; but see more particularly* Post. tits. PRACTICE, VARIANCE.]

I. DECLARATION.

See also Ante. tit. PEER.

1. Where the cause of action arose on the 29th *January*, being the first day of the *fourth* year of the reign of *Geo.* 4, and the declaration was entitled "*Saturday* next after fifteen days of St. *Hilary*, in *Hilary* Term, in the *third* year of the reign of King *George* the Fourth;" which would be the 1st *February* in the *fourth* year of the reign:—Held, on demurrer, that the declaration was properly entitled, though the plaintiff appeared in terms to have commenced his action before the cause had arisen. *Law* v. *Pugh*, 2 Dow. & Ryl. 868.

2. Where the plaintiff's name was stated in the commencement of the declaration to be *James Toll Hutchins*, and the defendant demurred specially, that the plaintiff was named throughout in the subsequent part of the declaration as "the said *James*" only:—Held sufficient, because *non constat*; but that "*Toll*" was part of the surname. *Hutchins* v. *Gilbie*, 2 Chit. 335.

3. An ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense which would sustain the verdict. *Huntingtower (Lord)* v. *Gardiner*, 1 B. & C. 297.

Same v. *Ireland*, 2 Dow. & Ryl. 450.

And see *Avory* v. *Hoole*, 2 Cowp. 825.

II. PLEAS.

See *Lees* v. *Wright*, 1 Dow. & Ryl. 391. Ante. page 28.

1. The mere practice of the Court is not pleadable. *Cherry* v. *Powell*, 1 Dow. & Ryl. 50.

See *S. C.* Ante. page 41.

POOR.

I. OVERSEERS.

(*a*) *Liability of.*

For the removal of an order for the appointment of Overseers by Certiorari, see *Rex* v. *Somersetshire Justices,* 1 Dow. & Ryl. 443. Ante. page 75.

1. A person occupying a house in one parish by means of a clerk only, and paying rent, rates, and taxes, but sleeping in another parish, is a *substantial householder* within the statute 43 *Eliz.* c. 2, and liable to serve the office of overseer of the poor in the first-mentioned parish. *Rex* v. *Poynder,*
2 Dow. & Ryl. 258.
S. C. 1 B. & C. 178.

2. A pauper having casually met with an accident in the parish of *W.*, the surgeon of that parish attended him; and in the progress of the cure, one of the overseers of the parish to which the pauper belonged, called on the surgeon and desired him *to take care of the pauper, and do what he could for him,* and added, that "*he would see him paid;*" and on a subsequent application by the parish officers of *W.*, after the pauper was removed to his own parish, the overseer said, "*if it was right that they should pay the surgeon's bill, they would:*"—Held, in an action against the overseer by the surgeon for the amount of his bill, that there was no legal obligation on the part of the former to pay such amount. *Gent* v. *Tompkins,*
1 Dow. & Ryl. 541.

3. *J. S.* being the master of a workhouse, appointed by and receiving orders from the guardians of the poor of the parish of *W.*, bought provisions from the defendant, one of such acting guardians:—Held, that the latter was liable to the penalty of 100*l.* imposed by the statute 55 *Geo.* 3, c. 137, s. 6. *West* v. *Andrews,* 5 B. & A. 328.

4. And such guardian is liable although there is no proof of his appointment; and if a parish officer is liable to the penalties imposed by 22 *Geo.* 3. c. 83, s. 42, he may still be proceeded against under the general act 55 *Geo.* 3, c. 137, without regard to the former statute. *West* v. *Andrews,*
2 Dow. & Ryl. 184.
S. C. 1 B. & C. 77.

5. Where the declaration alleged that the defendant was a person having the providing for, ordering, management, control, and direction of the poor of the parish of *W.*, and that he had supplied the poor of that parish with provisions; and it appeared that *W.* was one of five united parishes, whose poor were jointly maintained by all the parishes in one common workhouse:—Held, that the offence was well laid;—and it seems that the declaration need not have alleged that the provisions were supplied "for the use of the *workhouse*," in order to bring the case within the statute.
2 Dow. & Ryl. 184.
S. C. 1 B. & C. 77.

6. And where a parishioner, by means of a local Act of Parliament, is qualified to be a guardian of the poor in respect of his estate in the parish, and *ipso facto* becomes a guardian thereby, and supplies goods for the maintenance of the poor, he is *prima facie* liable to the penalties of the statute 55 *Geo.* 3, though there was no evidence of his having acted as a governor or guardian during the times the goods were supplied, or of any express contract to supply the goods within the words of that statute. *Stanley* v. *Dodd,* 1 Dow. & Ryl. 397.

7. But where, by a local act, viz.

3 *Geo.* 3, for regulating the affairs of a parish, the churchwardens and overseers for the time being, were directed to meet annually at *Easter* to nominate and appoint twenty discreet vestrymen, who, together with the churchwardens and overseers, were to be, and be called *Governors and Directors* of the poor; and by the statute 13 *Geo.* 3, the same mode of nominating and appointing twenty discreet vestrymen was to be adopted; and it was further enacted, that they, together with the churchwardens and overseers, *and all persons seised of land, &c. within the parish*, of the annual value of 80*l.*, should be, and be called *Governors and Directors* of the poor; and by the statute 53 *Geo.* 3, reciting the previous acts, it was enacted, that the churchwardens and overseers, and thirty-two vestrymen by name, and their successors, to be nominated and appointed in the manner directed by the recited acts, *should be the Governors and Directors*:—Held, that this latter act virtually repealed the former acts; and that a governor and director by estate, within the meaning of the 13 *Geo.* 3, who supplied the poor of the parish with provisions, was not liable to the penalties of the statute 55 *Geo.* 3, c. 137, s. 6. *Stanley* v. *Dodd*, 2 Dow. & Ryl. 809.

8. An overseer is discharged by his bankruptcy and certificate from a debt due in respect of a sum in his hands as such overseer at the time of the bankruptcy, although he became bankrupt before the expiration of his year of office, as he could not be compelled to account until the expiration of such year. *Rex* v. *Tucker*, 5 M. & S. 508. *S. C.* 2 Chit. 286.

9. A commitment under the statute 50 *Geo.* 3, c. 49, s. 1, of the late overseers, for not delivering up parish books, should specify what the books were. *Grover* v. *Forrester*, 2 Chit. 286.

(*b*) *Accounts.*

See *Rex* v. *Seville*, 5 B. & A. 180. Ante. page 79.
Rex v. *Manchester (Justices)*, 1 Dow. & Ryl. 454. Ante. page 185.
S. C. nomine Rex v. *Lancashire (Justices)*, 5 B. & A. 755.

1. By the statute 23 *Geo.* 3, (regulating the affairs of the poor of *Birmingham*,) the guardians and overseers thereby appointed, are directed to adjust their accounts at quarterly meetings of their own body; and an appeal is given to the Sessions in respect of all matters done by virtue thereof; but the statute is silent as to any submission of the overseers' and guardians' accounts to magistrates, as required by the statute 50 *Geo.* 3, c. 49:—Held, however, that a *mandamus* would lie from the Court of K. B. to the guardians and overseers to pass their accounts in the manner required by that statute. *Rex* v. *Warwickshire (Justices)*, 2 Dow. & Ryl. 299.

2. And a *mandamus* was issued to receive an appeal against overseers' accounts, though such accounts had not been previously examined and allowed at a special Sessions under the statute 50 *Geo.* 3, c. 49, s. 1. *Rex* v. *Colchester (Justices)*, 1 Dow. & Ryl. 146. *S. C.* 5 B. & A. 535.

3. But an appeal against such accounts must be made to the next general Quarter Sessions after the allowance of the accounts. *Rex* v. *Worcestershire (Justices,)* 5 M. & S. 457.

II. RATE.

(*a*) *What Property rateable.*

1. Where fir and larch were planted with oak and ash-trees, principally for the purpose of affording a screen or shelter to the latter in their infancy, and were cut from time to time as such oak and ash required more room to spread, and when once cut did not spring again; and although when sold they yielded a profit:—Held, that they were not *saleable underwood* within the statute 43 *Eliz.* c. 2, as the primary object of planting them was not to derive a profit by sale, and, consequently, that they were not rateable to the relief of the poor. *Rex* v. *Ferrybridge (Inhab.)*, 2 Dow. & Ryl. 634. *S. C.* 1 B. & C. 375.

2. *Quære*—Whether under any circumstances fir and larch can be considered underwood?—It seems not. 2 Dow. & Ryl. 634.

3. The profits arising from the sale of gas, manufactured from coal, and conveyed through pipes and trunks under the pavement for the purpose of lighting a town, are not rateable to the relief of the poor, under the 43 *Eliz.* c. 2; but the company is only rateable in a sum equal in amount to that for which the premises would let to other persons

willing to carry on the same business. *Rex* v. *Birmingham Gas Light and Coke Company*, 2 Dow. & Ryl. 735. *S. C.* 1 B. & C. 506.

(b) On whom and how made, and Property when and where rateable.

See *Novello* v. *Toogood*, 2 Dow. & Ryl. 833. *S. C.* 1 B. & C. 554. Ante. page 112.

Rex v. *Manchester Waterworks*, 3 Dow. & Ryl. 20. *S. C.* 1 B. & C. 630. Ante. page 196.

1. A landlord and owner of soil not residing within a parish, having granted a licence by indenture for twenty-one years to certain adventurers, to dig for tin and other ore under a close, reserving to himself one-eighth share of the ore in an improved and merchantable state, and granting to the adventurers the exclusive occupation of the mine for the purpose of procuring the ores, is rateable for the relief of the poor of the parish in which the mine is situate, in respect of such reserved proportion or eighth share; and in respect thereof, is to be considered as an occupier of the land by the hands of the adventurers;—the reservation operating as an exception out of the demise, and not being in the nature of a rent. *Rex* v. *St. Austell (Inhab.)*, 1 Dow. & Ryl. 351. *S. C.* 5 B. & A. 693.

2. Where a corporation, consisting of a mayor, alderman, and twenty-four capital burgesses, were seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle trespassing, &c.; and by a Court of Orders and Decrees, regulations were annually made concerning the right of common to be exercised by the freemen, as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head; which price was always paid by the freemen exercising the right, to the treasurer of the corporation, and which money, after deducting the expense of management, was distributed among the poorer burgesses who had no cattle to depasture:—Held, that the corporation were liable to be rated to the poor as beneficial occupiers of the land in question, within the meaning of the statute 43 *Eliz.* c. 2. *Rex* v. *Sudbury (Mayor, &c.)*, 2 Dow. & Ryl. 651. *S. C.* 1 B. & C. 389.

3. The *Hull* Dock Company are rateable in respect of the tonnage-duties received by virtue of the statute 14 *Geo.* 3, c. 56; although the expenditure in repairs during the period for which the rate was made payable, exceeded the amount of the duties received by them. *Rex* v. *Hull Dock Company*, 5 M. & S. 394.

4. A canal company is rateable to the relief of the poor in each and every parish through which their canal passes, as occupiers of land covered with water; and where they were rated for a certain number of acres of land within a township occupied by their canal, and were assessed in respect of that land at a sum not exceeding that which they actually received for the passage of goods over that part of the canal situate within the township:—Held, that it was a good rate. *Rex* v. *Trent & Mersey Canal Company*, 2 Dow. & Ryl. 752. *S. C.* 1 B. & C. 545.

5. And where the proprietors of an inland navigation, running through fourteen different parishes, were rated to the poor of the fourteenth parish (in which the profits arising from the whole navigation were received) in respect of the whole amount of the profits:—Held, that the rate was too high, and ought to have been apportioned among all the parishes through which the navigation passed. *Rex* v. *Palmer*, 2 Dow. & Ryl. 793. *S. C.* 1 B. & C. 546.

6. So, the proprietors of a river navigation are rateable in a parish through which the navigation passes, (though no riverage dues are received in such parish,) in proportion to their profits upon the whole line of navigation. *Rex* v. *Portmore (Earl,)* 2 Dow. & Ryl. 798. *S. C.* 1 B. & C. 551.

And see a note by the reporters, as to the ground on which the earlier cases on this subject were decided. 1 B. & C. 552.

(c) Appeals against.

1. Where corporate justices consist of a greater number than four, an appeal lies to them at Sessions against a poor-rate; although there are less than four

who are devoid of interest in the question. *Rex* v. *Essex* (*Justices*), 5 M. & S. 513.

2. A poor-rate having been made on the 9th, allowed on the 11th, published on the 14th, and the Sessions commencing on the 15th *April*:—Held, that an appeal against the rate need not be entered until the Sessions next but one after the publication of the rate. *Rex* v. *Hendon (Inhab.)*, 2 Dow. & Ryl. 249.

3. By the statute 10 *Anne*, the city of *Norwich*, and hamlets and liberties of the same, were incorporated for the purpose of better employing and maintaining the poor thereof; and the guardians thereby appointed were empowered from time to time to ascertain what aggregate sums would be necessary for that purpose, and to ascertain what proportion each parish, &c. should contribute, and then certify the same to the Justices; two of whom were to issue their warrant, requiring the proper officers of each parish, &c. to rate and assess the amount on the respective inhabitants;—and it was provided that if any person, parish, &c. should find himself or themselves to be unequally assessed, he or they might appeal at the next Sessions held after such *assessment made and demanded.* And where under that act, the governors certified that the hamlet of *L.* ought to pay a certain proportion of an assessment made upon the whole city; and two Justices issued their warrant, requiring the collectors of that hamlet to assess that sum upon the inhabitants; and the hamlet being aggrieved by such assessment:—Held, that the churchwardens and overseers might appeal against both the certificate and the warrant thereon, as being *an assessment made and demanded*, within the meaning of the appeal clause in the statute. *Rex* v. *Norwich (Justices)*, 3 Dow. & Ryl. 42.

III. SETTLEMENT.

(*a*) *By Emancipation.*

1. On a question of emancipation the Court laid down this general rule, in order to exclude discussions on particular cases in future:—"that no emancipation is effected during minority, unless by marriage, becoming the head of another family, or contracting some other relation so as wholly and permanently to exclude parental control;"—and it seems that an infant acquiring a settlement of his own, does not properly constitute an emancipation. *Rex* v. *Wilmington (Inhab.)*, 1 Dow. & Ryl. 140. *S. C.* 5 B. & A. 525.

2. Where a pauper eighteen years of age, and residing with his father, was drawn as a militia-man, and served five years as a balloted man; and during his service he several times when on furlough, and eventually after his discharge, returned to his father's house:—Held, that by his so remaining separate from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part. *Rex* v. *Hardwick (Inhab.)*, 5 B. & A. 176.

3. But where a minor enlisted into the royal marines, and having been discharged from that service at the end of the war, and returned to his father's family before he attained twe ty-one:—Held, that he was not emancipated. *Rex* v. *Rotherfield Greys (Inhab.)*, 2 Dow. & Ryl. 628. *S. C.* 1 B. & C. 345.

(*b*) *By Hiring and Service.*

1. At the expiration of a year's service in the parish of *N.*, a master being about to remove into the parish of *B.*, asked his servant "if he would like to go with him thither?" to which the servant answered, "he had no objection:" and the master replied, "I fear you are scarcely strong enough for the work there, but try." The servant went into *B.*, and after serving his master for six weeks, the latter asked what wages he expected; to which he answered,—"What you please." The master then said, "he would give him the same as the year before;" with which he was satisfied, and remained in the service until within ten days of the next *Michaelmas;* for which period the master deducted a proportionate amount of wages:—Held, that this was a conditional hiring, and conferred a settlement on the servant. *Rex* v. *Northwold (Inhab.)*, 2 Dow. & Ryl. 790.

2. But where a pauper was hired to serve as a servant in husbandry from *Michaelmas* 1821, to *Michaelmas* 1822, at 10*s. per* week for the winter half year and 11*s. per* week for the summer; and if he and his master could not agree for

the harvest month, the pauper was to harvest for himself; and previously to the harvest, the master offered the pauper 5*l.* for the harvest, which he accepted, and continued in the service during the whole year:—Held, that this was an exceptive, and not a conditional hiring; and that no settlement was gained. *Rex* v. *Althorne*, 2 B. & C. 112.

3. But where a pauper was hired by indenture for a year as a driver in a colliery, at the wages of 1*s.* 10*d.* for a good day's work, not exceeding fourteen hours, and 2*d.* a-day more when that time was exceeded; and he was to forfeit 10*s.* 6*d.* for every act of disobedience, and 2*s.* 6*d.* *per* day for lying idle, to be deducted out of his wages; and there was a proviso, that nothing in the indenture should be construed to oust the jurisdiction of the Justices, or to prevent either master or servant from applying to them in case of disputes; as well as a covenant, that in case the master about *Christmas* should wish to repair any engine, &c. belonging to the colliery, he might stop the working for any period not exceeding seven days, without paying any wages to the pauper, unless employed in other work:—Held, that this was a conditional, and not an exceptive contract; and that the pauper gained a settlement by serving under it for the whole year. *Rex* v. *Byker (Inhab.)*, 2 B. & C. 114.

4. But where a pauper was, together with many other persons, hired to work in a colliery from the 5th *April*, 1813, to the 5th *April*, 1814; and amongst other things it was stipulated that each man should on each *working* day do such a quantity of work as should be deemed equal to a full day's work, and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2*s.* 6*d.*; and the master stipulated to find work for the men during the whole year, and to forfeit 2*s.* 6*d.* for every day that he should oblige them to lie idle, except at the *Christmas* holidays, which were not to exceed ten days; and there was also a proviso, that nothing in the agreement should oust the jurisdiction of the magistrates; and the pauper worked for the whole year, including the holidays, except on certain *Saturdays* called *pay Saturdays*, when the wages were paid, and the men did no work:—Held, that this was not a hiring and service, so as to confer a settlement, as the pauper had not stipulated to be under the control of the master for the whole year. *Rex* v. *Gateshead*, 2 B. & C. 117. (*n.*)

(*c*) *By Apprenticeship.*

1. An indenture of apprenticeship, executed before the passing of the statute 44 *Geo.* 3, c. 98, must be stamped with the premium stamp within the time prescribed by the statute 8 *Anne* c. 9; and where such an indenture was stamped at the time of its being produced in evidence with the stamp required by the 55 *Geo.* 3, c. 184, but not within the time prescribed by the statute of *Anne*:—Held, that the indenture was altogether void, and that a pauper gained no settlement by serving under it. *Rex* v. *Chipping-Norton (Inhab.)*, 5 B. & A. 412.

2. Where a parish apprentice was assigned (before the passing of the statute 56 *Geo.* 3, c. 139) by his original master to a new one, by an instrument in writing, but without the consent of two Justices, as required by the statute 32 *Geo.* 3, c. 57, s. 7:—Held, that such apprentice gained a settlement by service with the second master under the contract with the original master, as it was sufficient to shew his consent to the service to the second master. *Rex* v. *Barlestone (Inhab.)*, 1 Dow. & Ryl. 421. *S. C.* 5 B. & A. 780.

3. A parish apprentice bound for nine years, having served six, asked his mistress leave to go into another service, without mentioning where he was going; to which she consented, saying she was not against it, if he could better himself. He then hired himself as a yearly servant to a master in another parish at certain wages, and returned and informed his mistress of the fact: to which she said, "Very well; I am not against it." In a few days he went to his new place, and in about a fortnight returned to his mistress for his clothes, who said "she hoped he liked his place," and he said "he did," and went back and lived there for three months:—Held, that this was not such a consent on the part of the mistress as would give the pauper a settlement under the indenture in the parish where the new master resided; and that the service with him was not as an apprentice, but as a servant under a contract of hiring. *Rex* v. *Whitchurch (Inhab.)*, 2 Dow. & Ryl. 845. *S. C.* 1 B. & C. 574.

(*d*) *By renting a Tenement.*

1. Where a pauper took a tenement on the 21st *May*, 1819, under a written agreement, and did not actually take possession until the 4th *June*, but paid rent from the date of the agreement:—Held, that he did not come to reside until the 4th *June*; and consequently, that the settlement was concluded by the statute 59 *Geo.* 3, c. 50, which passed on the 2d *July*, 1819, although he afterwards resided more than forty days. *Rex* v. *Brighthelmstone (Inhab.)*, 1 Dow. & Ryl. 313.

2. Where a pauper rented and resided on a tenement of 9*l.* 10*s.* a-year, and during the same time contracted by the year for two ponds, or the rushes and flags growing therein, (he being by business a chair-bottomer,) and which he was to have the exclusive right of cutting at his pleasure, the owner of the ponds reserving to himself the use of the water as he thought proper; the rent agreed for being five shillings a year for one pond, and the same sum and two door-mats, of the value of two shillings, for the other:—Held, that he thereby acquired a settlement; the whole being together above the value of 10*l.* *per annum.* *Rex* v. *All Saints, Cambridge, (Inhab.)*, 2 Dow. & Ryl. 47. *S. C.* 1 B. & C. 23.

3. Renting a house, and letting part of it to a lodger, is holding a separate and distinct dwelling-house within the statute 59 *Geo.* 3, c. 50, so as to confer a settlement. A *tenement*, within the meaning of that statute, may consist of house and land taken at different times and of different persons, provided the whole annual rent amounts to 10*l.*, and the house and land be in the same parish. *Rex* v. *North Collingham (Inhab.)*, 2 Dow. & Ryl. 743. *S. C.* 1 B. & C. 578.

4. So, where a pauper was hired as ground-keeper, and his master agreed to give him 20*l.* a-year wages, a cottage to live in, and the agistment and whole profits of one cow for his own services, and the sum of 28*l.* and the agistment and whole profits of another cow, in consideration of his lodging and maintaining in the cottage two of his master's labourers:—The contract being entire, and the annual value of the lands on which the two cows were depastured being more than 10*l.* but the annual value of land sufficient to depasture one cow only would have been less than 10*l.*:—Held, that he gained a settlement by renting a tenement, and having the right to agist the two cows. *Rex* v. *Cherry Willingham (Inhab.)*, 3 Dow. & Ryl. 13. *S. C.* 1 B. & C. 626.

5. But where a pauper was hired as a labourer in husbandry to serve a farmer, under an agreement that he was to have yearly wages, and his master either to find him two cows, or he was to provide himself with two, *and feed them on his master's farm*; and the pauper bought one cow, and his master found him another, both of which were fed during the summer on his master's pasture, and in the winter were kept in his master's straw-yard, and fed with hay grown upon the farm; and the pasture and the hay-feeding were respectively worth 5*l.* 5*s.* a-year:—Held, that the pauper did not gain a settlement by renting a tenement of 10*l.* value; but it would have been otherwise if the contract had been that the cows were to be *pasture-fed.* *Rex* v. *Sutton Saint Edmunds (Inhab.)*, 2 Dow. & Ryl. 800. *S. C.* 1 B. & C. 536.

6. Where a testator charged his manor and lands with an annuity of 20*l.* to be paid by trustees to a parish schoolmaster, to be nominated by the person or persons who for the time being should be entitled to the possession of the manor; and in pursuance of the will, a schoolmaster was appointed, and received the annuity for seven years, during which time he had the possession of a house (rent-free, but worth 10*l.* a year), which was assigned to him as his residence in the character of schoolmaster:—Held, that such residence gained him a settlement within the statute 13 & 14 *Car.* 2, though by the terms of the will he was liable at any time to be dismissed from the office of schoolmaster at the will and pleasure of the donor, and although he underlet part of the house to the parish at an annual rent. *Rex* v. *Lakenheath (Inhab.)*, 2 Dow. & Ryl. 816. *S. C.* 1 B. & C. 531.

(*e*) *By Estate.*

1. Under a devise to the use of trustees in fee, in trust, (after the payment of debts of the testatrix,) to receive the rents for the benefit of her brother *M. S.*,

his wife and children, all or any of them, during his life, as they should think proper; and after his decease, in trust for her nephew, &c.:—Held, that *M. S.*, who, after the death of the testatrix, and by permission of the trustees, occupied a cottage in the township where the lands devised were situate, until his death, did not acquire a settlement thereby; the rent and profits of the lands having been insufficient to pay the debts of the testatrix, and *M. S.* being, at the time of her decease, and from that time until his death, an uncertificated bankrupt. *Rex* v. *Darlington (Inhab.)*, 5 M. & S. 493.

2. Where the lord of a manor granted a lease of a cottage for thirty-one years to *A.*, who resided in it more than a year, and died intestate, seised of the cottage, leaving his wife and three daughters, him surviving; and the wife obtained letters of administration, but made no distribution of her husband's effects; and the husband of one of the daughters, was, by permission of the administratrix, let into possession of the cottage, and he and his wife resided in it for some years, until they became chargeable to the parish, without paying any rent, which during that time was paid by the administratrix:—Held, that the daughter, or her husband, in her right, had not such an estate in the premises, that a Court of equity would have decreed a conveyance, and clothed them with the legal title, so as to confer a settlement by an irremovable residence of forty days. *Rex* v. *Berkswell (Inhab.)*, 3 Dow. & Ryl. 9. *S. C.* 1 B. & C. 542.

3. And where the lord of a manor gave *G.* a licence in writing to build a house on the waste, which he built accordingly, and having resided therein two years, sold it to *B.*, who again sold it to *T.* for 30*l.*, but no conveyance was executed; and *T.* occupied the house for five years, and paid annually one shilling to the lord, and then resold it for 34*l.*, and no adverse claim was made:—Held, that *T.*, although he paid a consideration of 30*l.*, did not purchase such an estate or interest, either legal or equitable, as to give him a settlement by virtue of the statute 9 *Geo.* 1, c. 7, s. 5. *Rex* v. *Hagworthingham (Inhab.)*, 3 Dow. & Ryl. 16. *S. C.* 1 B. & C. 634.

4. So, where a written agreement was made for the purchase of an estate, to be paid for by two instalments, the first of which was to be payable within two days after the signing of the agreement, and the last after the expiration of seven months; and the vendor was to make a good title on payment of the last instalment, and to convey the premises; but the purchaser was to be let into possession upon the payment of the first instalment; and he paid the first instalment and was let into possession accordingly, and continued in possession for a year and a half; but the last instalment was never paid, nor was any conveyance executed; and the purchaser afterwards gave up the contract, on receiving back part of the first instalment:—Held, that under this contract, the purchaser did not acquire any equitable estate, so as to gain a settlement under that statute. *Rex* v. *Geddington (Inhab.)*, 2 B. & C. 129.

(*f*) *By Payment of Rates.*

1. A settlement may be gained by being rated and paying parochial taxes in respect of a tenement, being above the annual value of 10*l.* *Rex* v. *St. Pancras (Inhab.)*, 2 B. & C. 122.

2. But a person occupying apartments at 4*l.* a-year, part of a dwelling-house of the annual value of 18*l.*, does not, since the statute 33 *Geo.* 3, c. 101, s. 4, acquire a settlement; although he be rated and pay church and poor-rates for the whole of the house. *Rex* v. *Penryn (Inhab.)*, 5 M. & S. 443.

IV. REMOVAL, ORDERS OF.

(*a*) *Who may be removed under.*

1. The daughter of *Irish* parents, unmarried and pregnant with a child likely to be born a bastard, and therefore actually chargeable by the statute 35 *Geo.* 3, c. 101, s. 6, may be removed to the place of her birth in *England*, though unemancipated; but the father and rest of his family do not through her become chargeable by force of the statute 59 *Geo.* 3, c. 12, s. 33, so as to render the whole family removable by a pass to *Ireland*. *Rex* v. *Whitehaven (Inhab.)*, 1 Dow. & Ryl. 384. *S. C.* 5 B. & C. 720.

2. Where an extra-parochial district

was erected by a local act of Parliament into a new township, and it was declared that it should from thenceforth provide for its own poor, repair its own roads, and be subject to the same regulations as were incident to other townships in the same county:—Held, that this clause was prospective only; and that a pauper bastard, born within the district before it was erected into a township, was not removable to the new township as the place of his birth. *Rex* v. *Oakmere (Inhab.)*, 1 Dow. & Ryl. 427. *S. C.* 5 B. & A. 775.

(*b*) *Appeals against.*

1. Where an order of removal was dated on the 1st *August*, 1814, and an order of suspension indorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and indorsement was served on the appellants in 1814, but the original order was not produced at the time of serving such copy; and in 1815 another part of the order and indorsement, executed by the same Justices, but bearing date in *August* 1814, was served on the appellants, and the pauper was not removed till 1819, when an appeal was duly entered:—Held, that the services of the original order of removal in 1814 and 1815, were both defective; and that the appeal was made in time, notwithstanding the statute 49 *Geo.* 3, c. 124, s. 2. *Rex* v. *Alnwick (Inhab.)*, 5 B. & A. 184.

2. Where two Justices on the 20th *August* removed a pauper from the parish of *A.* to the parish of *B.*, and on the 5th *September* following, the churchwardens of *B.* gave notice of appeal to the Sessions, to be holden on the 17th *October*; and on the 10th of that month the Justices made an order superseding their former order of removal, doubting its validity; which *supersedeas* was served on the parish officers of *B.*, who treated it as a nullity, and went to the Sessions, where the Justices refused to hear the appeal;—the Court refused to grant a *mandamus* to the Sessions, to enter, hear, and determine it. *Rex* v. *Norfolk (Justices,)* 1 Dow. & Ryl. 69. *S. C.* 5 B. & A. 484.

POST-HORSE DUTY.

See the Statute 4 *Geo.* 4, c. 62.

1. Additional horses hired under a contract to assist in drawing a stage coach up a hill, are not subject to the post-horse duty of 1½*d.* a mile, under the statute 57 *Geo.* 3, c. 59, and the previous Acts relating to such duty. *Dowse* v. *Garett*, 1 Bing. 107.

2. Horses hired merely for the pleasure and recreation of the rider, are not liable to the duties imposed by the 44 *Geo.* 3, c. 98, and 1 *Geo.* 4, c. 88. To make them liable to such duties, they must be let to be used in travelling. *Ramsden* v. *Gibbs*, 2 Dow. & Ryl. 617. *S. C.* 1 B. & C. 319.

3. But a composition for saddle-horses under the Assessed-tax Act, 59 *Geo.* 3, c. 51, does not protect the owner of such horses from his liability to pay the duty imposed by the statute 1 *Geo.* 4, c. 88, s. 3, where the same horses are let to hire to be used in travelling. *Ramsden* v. *Hodgkinson*, 2 Dow. & Ryl. 625.

POWER.

I. CONSTRUCTION AND EXECUTION OF.

1. Where a power of attorney, signed by the defendant, was given to fifteen persons by name, "jointly or separately to sign and underwrite all such policies

of assurance as they or any of them should jointly or separately think proper:"—Held, that this was to be construed as a joint and several authority; and that the plaintiff might maintain an action on a policy underwritten by four of the persons therein named. *Guthrie* v. *Armstrong*, 1 Dow. & Ryl. 248. *S. C.* 5 B. & A. 628.

2. A testator devised all his estates to *A. G.* and *T. G.* for one hundred years, upon certain trusts mentioned in his will; and subject thereto, he devised them to his wife during her widowhood, and to *H. P. W.* and *J. S.*, and the survivor, and also to the heirs of such survivor of the two latter, on certain trusts therein also mentioned, to the use of divers persons for life and in tail: he then directed that the three latter trustees should, out of the rents and monies, discharge all his debts, legacies, &c.; and that if his personal estate should be insufficient to pay the same, they were to raise and charge the deficiency on the real estate before devised to them: he then declared, that if his personal estate should be insufficient to raise and pay portions for his younger children;—*A. G.* and *T. G.* should raise the same by sale or mortgage of the one hundred years' term; and all the rest and residue of his real and personal estates he devised to his wife, *H. P. W.*, and *J. S.*, and the survivors and heirs of such survivor of the two latter, on certain trusts thereinafter also mentioned. Then followed a power of sale, in which the testator stated, that "Whereas the moiety of several estates had descended to him as one of the heirs-at-law of the late Mrs. *B. A.*, and whereas it might be convenient to sell any or all of them, either for the portions of his younger children or otherwise, or to divide and proportion the said estates, or any part of them: he thereby empowered *his said trustees* to sell or divide and proportion all or any of the said estates, and declared that their acts should be valid to all intents, so that the monies arising by the sale of all or any of the said estates were kept and preserved, and remained and enured to and for the several uses and trusts directed by his will:" —The testator then nominated and appointed his wife, *H. P. W.* and *J. S.*, the joint and sole guardians of all his children, and fully and wholly to execute his will, in trust as thereinbefore directed. The testator died, leaving his wife, *H. P. W.*, and *J. S.* surviving, who proved the will. *J. S.* afterwards died, leaving the testator's widow and *H. P. W.* his co-executors, who afterwards, by indentures of lease and release, conveyed the moiety of one of the testator's estates to a purchaser in fee:—Held, that such conveyance was a good execution of the power for sale, given by the will of the testator. *Smith* v. *Leigh*, 6 Moore 214.

II. OF APPOINTMENT.

See *Jersey (Earl and Countess)* v. *Deane*, 5 B. & A. 569. Ante. page 139.

1. Where lands were settled, subject to a power of sale in trustees, with the consent of the tenant for life, and a recovery was afterwards suffered, in which the tenant in tail under the settlement was vouched; and by the recovery-deed it was agreed that the recovery should enure in confirmation of the estates created by the settlement, which were antecedent to the estate tail, and in confirmation of the powers annexed to those estates, and subject thereto, to such uses as the tenant for life and tenant in tail should appoint: and the tenant for life and the tenant in tail afterwards exercised their power of appointment, and the trustees concurred with them in a conveyance of the lands, and thereby created new powers of sale:—Held, that the power of sale in the original settlement was not destroyed. *Roper* v. *Hallifax*, 8 Taunt. 845.

2. Where *A.*, on the marriage of his daughter *C.*, conveyed property to the use of himself for life; remainder to the use of *B.*, his daughter's intended husband, for life; remainder to the use of *C.* for life; remainder to the use of the sons of the marriage successively in tail; remainder to the use of the daughters of the marriage as tenants in common in tail; reversion to the use of *A.* for ever: and *A.* afterwards devised all his property, not before settled, to the use of his widow for life; remainder to the use of *B.* and *C.* for life; remainder to the use of their sons successively in tail, (subject to a term for the provision of younger children;) remainder to the use of the daughters as tenants in common in tail; remainder to the use of *C.* and her heirs:—and *B.* and *C.* afterwards levied a fine of all the before-mentioned premises to the use (subject to the uses

in the settlement and will mentioned,) of such person as *C.*, by will in writing, or any writing of appointment purporting to be such will, to be by her signed in the presence of, and attested by three or more witnesses, should appoint, (which will, or writing of appointment in nature of a will, *C.*, notwithstanding her coverture, was thereby empowered to make;) and in the mean time, and for want of such appointment for the whole or any part, to the use of *C.* and her heirs:—*C.* having survived *B.*, by whom she had no issue, married *D.*, whom she also survived, and then died, leaving *E.* an only son by *D.*:—To this son, *C.*, in 1819, by an instrument purporting to be her will, signed in the presence of, and attested by three witnesses, left all her real estate in fee, the instrument containing a provision that the property should go over to *C.*'s sister in case of *E.*'s dying in *C.*'s lifetime. *E.* shortly afterwards died a minor, intestate and without issue:—Held, that the instrument executed by *C.* in 1819, did not, as to the estates comprised in the fine, operate as an execution of *C.*'s power of appointment, but as a devise by her by force of her interest. *Langley* v. *Sneyd*, 3 Brod. & Bing. 243.

III. TO MAKE LEASES.

1. Under a power given by a marriage settlement to a tenant for life to lease for years, determinable on three lives, reserving the ancient and accustomed rents, duties, &c., "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved"—a lease for ninety-nine years, determinable on three lives, with a proviso for re-entry, "if the rent, duties, &c. should be unpaid or undone, in part or in all, by the space of fifteen days next over or after the day of payment, &c.; and no sufficient distress or distresses could be had or taken on the premises,"—was held (in ejectment by the reversioner against the lessee) to be a valid execution of the power:—Held also, that evidence was admissible to shew that the usual form of leases of the estate in settlement for years, determinable on three lives, as well prior to as after the settlement, was with a similar conditional proviso for re-entry, the tenant for life having under the power a discretion as to the terms of the proviso, which the power required *generally* to be inserted in such lease. *Doe d. Jersey (Earl)* v. *Smith*, 5 M. & S. 467.

S. C. in Cam. Scac. (in error), 5 Moore 332. See also 3 Moore 339.

2. Where a power of leasing for years required the insertion in the leases of a clause of re-entry, if the rent should be behind for twenty-one days; and leases were afterwards made with a power of re-entry, if the rent should be behind or unpaid for twenty-one days, *and no sufficient distress* could be had:—Held, that such leases were valid, and might be supported. *Tankerville (Lord)* v. *Wingfield*, 5 Moore 346. (*n.*)

3. By a private act of Parliament, passed in 1720, certain estates were settled in strict settlement; and a power was reserved to the respective tenants in tail, by deed, to lease any part of the lands thereby settled "for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon every such lease there be reserved, and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents and services for the same; and so as there be contained therein a condition of re-entry for non-payment of the said rent and rents thereby to be reserved." By lease, dated the 6th *January*, 1785, a tenant in tail of the said estates, demised a part of the premises thereby settled, to hold from the date of the lease for ninety-nine years, if three persons therein named should so long live, yielding and paying yearly and every year during the said term, unto the lessor, the yearly rent of 50*l.* on the 25th *March* and 29th *September*, by even and equal portions, the first payment to be made on the 25th *March* ensuing the date of the lease:—Then followed a provision, that if the rent should not be paid on those days, or if certain amerciaments and fines therein mentioned, after reasonable demand, should not be paid, it should be lawful for the lessor, his heirs and assigns, to re-enter and distrain, and the distress to take away, detain and keep, until the rent be satisfied; and there was the following proviso for re-entry: "that in case the said yearly rent should be unpaid for the space of twenty-eight days after it became due, being lawfully demanded, it should be lawful for the

lessor, his heirs and assigns, to re-enter:" Previously to the time of passing the act, the premises demised by this lease had been demised jointly with other premises by the settlor's ancestor, by a lease bearing date the 2d *February*, 1708, "for ninety-nine years, determinable upon three lives, at a yearly rent of 82*l*., payable on the same days as those mentioned in the lease of the 6th *January*, 1785, the first payment to commence on the 25th *March* ensuing the date of the lease;" and it also contained a similar power for the lessor to distrain, and a power of re-entry, upon the rent being behind for twenty-eight days, upon its being lawfully demanded, and not paid, and no sufficient distress being found upon the premises: But it did not appear whether any other lease was granted between that period and the year 1756; and at that time another lease of the premises, demised by the lease of the 6th *January*, 1785, was granted at a rent of 32*l*., payable at the same period as in the other leases, containing the same power of distress and re-entry for non-payment of rent as those in the lease of the 6th *January*, 1785:—Held, first, that it was not a valid objection to the lease of the 6th *January*, 1785, that the rent was made payable on the 25th *March* and the 29th *September*, (although the term commenced on the 6th *January*, and therefore there was a forehand rent, which might prejudice the remainder-man,) inasmuch as the rent was made payable on the same days by the former lease, and therefore that this was the usual and accustomed rent;—secondly, for the same reason, that it was no objection to the lease, that the rent was made payable by half-yearly payments, although the power required it to be payable yearly; the word *yearly* meaning a payment of rent in the year:—thirdly, that it was no objection to the lease, that by the terms of it, the landlord could distrain only after a reasonable demand; and that he was bound to detain the distress until it was satisfied; for this being a clause introduced for his benefit, he was not thereby abridged of any right of distress which he had by common law, or of sale, under the statute 4 & 5 *William & Mary*;—fourthly, that it was no objection to the lease, that the clause of re-entry reserved the right of entry to the landlord, upon the rent being twenty-eight days in arrear; for this was a reasonable condition of re-entry, and was conformable to the old lease; nor was it any objection that the right of re-entry was made to depend upon the rents being lawfully demanded; for the landlord was not thereby deprived of the benefit of the 4 *Geo.* 2, c. 28, and consequently, was entitled by that statute to enter without making any demand:—Held also, that part of the premises formerly demised, jointly with others, at one entire rent, might be let under the terms of this power at a rent bearing the same proportion to the old rent, that the premises demised by the lease bore to the whole premises formerly demised. *Doe d. Shrewsbury (Earl)* v. *Wilson*, 5 B. & A. 363.

4. Under a power in a will, to let such part of the testator's premises as had been usually granted or demised, and were then in lease for any term of years, determinable on lives, to any persons for the like terms, and in like manner, and under the like rents, services, and conditions, as the same had been usually granted; and the residue of the same premises unto any person for any term of years not exceeding twenty-one years in possession, at the best rent that could be reasonably gotten for the same; so that no such *demise* or *lease* should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his lease:—Held, that a lease made under this power, of lands which were in lease at the time of the creation of the power, (the second lease accurately following the terms of the former lease of the same lands,) was well executed under such power, although the second lease did not contain a clause of re-entry on non-payment of 40*s*. reserved in lieu of a heriot:—the first lease containing no clause of re-entry on non-payment of a like reservation. *Doe d. Bligh* v. *Colman*, 1 Bing. 28.

5. An act of Parliament granted to a tenant for life a power to make leases for any term not exceeding ninety-nine years; "so as every such lease or leases be made *to take effect either in possession, or immediately after the determination of the leases then subsisting*, thereof, respectively; and so as in every such lease there be reserved to be payable, during the continuance of the term thereby to be

granted, *the best and most beneficial yearly rent* or rents, to be incident to the immediate reversion of the premises, *that can be reasonably had at the time of making such lease*, without taking any fine, foregift, &c." When this power was granted, the estate was let upon leases, which would expire on the 10th *October*, 1791. The tenant for life, in pursuance of one entire bargain, granted at one and the same time, two leases of the premises, one dated the 29th *May*, 1787, for thirty years, to commence on the 10th *October*, 1791; and the other dated the 4th *June*, 1787, for sixty-three years, to commence on the 10th *October*, 1821:—Held, that the last-mentioned lease was void, as it was a fraud upon the power, not being made to take effect immediately after the expiration of the subsisting lease. In the first of these two leases, a yearly rent of 270*l.* was reserved, and in the second, a rent of 120*l.* only; the grantor stipulating in the latter, that the tenant should rebuild the premises, either before the expiration of the term granted by the first lease, or within the first year of the term granted by the second:—Held that, supposing these rents to be the most beneficial which could be obtained as between lessor and lessee, still that they were not so, as between the tenant for life and the reversioner; and consequently, that the power was in this instance violated; and that the second lease was on this ground also void. *Doe d. Sutton (Bart.)* v. *Harvey*, 2 Dow. & Ryl. 589. *S. C.* 1 B. & C. 426.

6. Where, under a marriage settlement, the husband had the wife's estate for life, with a power to grant leases for twenty-one years, but no longer; and in breach of that trust, he granted a lease to *A.* for ninety-nine years, determinable on lives; and the wife survived him, and conveyed the fee to *B.*; and in the conveyance, the lease to *A.* was recited, who was recognized as then being tenant in possession of the estate, at the yearly rent reserved; and *B.* brought an action of ejectment against the assignees of the lease:- Held, that the lease being void, and the recital being only matter of description, no demand of possession was necessary to sustain the action. *Doe d. Biggs* v. *White*, 2 Dow. & Ryl. 716.

POWER OF ATTORNEY.—See POWER. I. 1. Ante. page 208.

PRACTICE.

I. RELATIVE TO PROCESS.

(*a*) *By Original.*

See AMENDMENT. I. Ante, page 12.

1. Process may be bailable against some, and serviceable against others of several defendants; and where an action is brought against more than four defendants, and two writs are sued out, it is not necessary, except with a view to fix bail, to name all the defendants in each writ, and it seems that if either of the writs are bailable, all the defendants should with a view to fix the bail be named in the *ac etiam* clause of the bailable writ. *Christie* v. *Walker*, 1 Bing. 48.

And see S. C. id. 68. 206.

2. *Præcipes* for *subpœnas* and attachments issued in the office of pleas in the Court of *Exchequer*, with the names of the parties, returns of writs, dates of issue, and names of attornies and side clerks,—must be given to the officer who signs such writs, as require the signature of the clerk of the pleas. *Reg. Gen. E. T.* 45 *Geo.* 3, 8 Price 506.

3. And affidavits of service of *subpœnas* on which attachments issue for want of appearance, must be filed in the office, 8 Price 506.

4. Process of *subpœna ad respondendum* may be issued out of the office of pleas; and it is not necessary that such process should be signed by the chief secondary, or a sworn clerk in the office of the King's Remembrancer; and the rules made in that respect in the reigns of James and Charles 2, are now obsolete. *Taylor* v. *Riley*, 9 Price 385.

(*b*) *By Bill.*

See AMENDMENT. I. Ante, page 12.

See also Post. DIV. V.

1. It is no valid ground of objection to a writ, that it is not signed by proper clerks, or that the King's title is not properly set out therein. *Anonymous*, 2 Chit. 356.

2. Before a writ is returnable, it may be altered as to the return day, without being restamped, provided there is no Term between the *teste* and the day on which it is ultimately made returnable;—Where therefore, a writ sued out in *Trinity* Term was afterwards twice resealed, and the return altered to the last day of *Michaelmas* Term, without a fresh stamp:—Held, that the writ not having been used until the defendant was arrested, was regular, and need not have been renewed. *Durdon* v. *Hammond*, 2 Dow. & Ryl. 211. *S. C.* 1 B. & C. 111.

3. A *latitat* was sued out against *A.*, and served upon *B.*, who filed common bail, as being sued in the name of *A.*; and a declaration was delivered to him, which was returned to the plaintiff's attorney:—an *alias* and a *pluries* were then severally sued out against *A.*, and he was served with the latter:—Held, that the *pluries* was regularly sued out, though the original writ was served upon *B.*, and a declaration delivered to the latter. *Clarke* v. *Johnson*, 3 Dow. & Ryl. 254.

(*c*) *Service of.*

1. It is not irregular to serve process even after eleven o'clock at night, it not being within the rule as to service of notices &c. before ten at night, but may be served at any time of the night. *Anonymous*, 2 Chit. 357.

2. Therefore, service of a copy of a writ of *latitat* at eleven o'clock at night is regular, and not within the rule of Court *Michaelmas Term*, 41 *Geo.* 3. *Upton* v. *Mackenzi* 1 Dow. & Ryl. 172.

3. So, in C. P. there is a distinction between the service of notices and service of process,—and the latter may be served at any hour. *Priddee* v. *Copper*, 1 Bing. 66.

4. Where the defendant was served with a copy of a *capias*, and a quarter of

an hour afterwards demanded to see the original, which was refused by the officer; the Court of C. P. set aside the service and subsequent proceedings. *Westley* v. *Jones*, 5 Moore 162.

5. Process may be bailable against some of several defendants, and serviceable against others. *Christie* v. *Walker*, 1 Bing. 48.

6. If a party incur expense in resisting a rule to quash a writ for irregularity, and the irregularity is not in the writ, but in the service only; the Court of C. P. will discharge the rule with costs. *Huggitt* v. *Parkin*, 1 Bing. 65.

(*d*) *Notice to appear.*

1. Where, in a copy of a writ of *latitat*, the defendant was described by the name of *Stafford*, and in the notice to appear, by the name of *Stratford*:—Held not to be a variance of which he could avail himself on a motion to set aside the service of the process for irregularity. *Wilson* v. *Stafford*, 2 Chit. 355.

2. So, *John* in the writ, and *Joseph* in the notice to appear, was held amendable; and therefore a rule to set aside the same for irregularity was refused. *Badgett* v. *Lee*, 2 Chit. 355.

3. It is immaterial whether the date of the year in the notice be in figures or not. *Anonymous*, 2 Chit. 356.

4. But a writ having a wrong return, cannot be aided by a correct day being mentioned in the notice to appear. *Anonymous*, 2 Chit. 356.

II. APPEARANCE.

1. An appearance by original should be entered within eight days after the *quarto die post* of the return of the writ; as in proceedings by original, the defendant has eight days after the appearance day, or *quarto die post*, to appear. *Anderson* v. *Reynolds*, 2 Chit. 35.

2. The costs of a *distringas* were directed to be paid by the defendant, and the sheriff was to sell the issues to satisfy such costs, though the defendant had appeared after the issues were levied, but before they were sold. *Bound* v. *Vaughan*, 2 Chit. 36.

3. The Court granted a rule to shew cause why the defendant's attorney should not enter a common appearance, in consequence of a *verbal* undertaking to appear. *Anonymous*, 2 Chit. 36.

4. A defendant cannot sign judgment of *non pros.* before an appearance is entered; and when special bail is required, the appearance is not complete till bail are perfected. *Anonymous*, 2 Chit. 37.

5. Where a plaintiff sued out one writ against four defendants jointly, for separate causes of action; and having filed a declaration conditionally against each separately, entered into a joint appearance for all of them according to the statute, and signed interlocutory judgment as for want of a plea:—Held, that it was irregular, as the plaintiff ought to have filed separate appearances. *Cox* v. *Bucknell*, 1 Dow. & Ryl. 545. *S. C.* 5 B. & A. 892.

III. PLEADINGS.

(*a*) *Declaration.*

See Post. Divs. V. VII. (*g*).

1. A plaintiff cannot deliver a declaration *de bene esse* upon process returnable the *last* return of the Term. *Key* v. *Browne*, 3 Dow. & Ryl. 28. *S. C.* 1 B. & C. 653.

2. On the 4th *May* the plaintiff sued out bailable process, returnable in one month of *Easter*, against *B.*, in which he only was named, and on which he was afterwards arrested; and he put in and perfected bail in *Easter* Term:—On the 11th *May* the plaintiff sued out serviceable process, (in which four other defendants were named, but not *B.*) returnable on the morrow of the *Ascension*; and a declaration as of *Trinity* Term was afterwards delivered against *B.*, together with the other four defendants: —Held, that the declaration was not irregular. *Christie* v. *Walker*, 1 Bing. 48.

3. Declarations and other pleadings in the Court of *Exchequer* must be engrossed on stamped paper, and entered in a book to be kept in the office of pleas. *Reg. Gen.* H. T. 60 *Geo.* 3, & 1 *Geo.* 4, 8 Price 85.

4. Where process was served on a defendant, in an action of trespass to try a right, and the person serving it having left him for a few minutes, but remaining in his sight during the interval, returned and delivered notice of a declaration having been filed *conditionally*; and an interlocutory judgment was signed for want of a plea:—that Court set aside the judgment on motion, on the terms of the defendant's paying the costs, inclusive of those of

the application. *Derby (Mayor)* v. *Wheeldon,* 9 Price 150.

Quære—Whether service of notice of declaration filed *de bene esse* on the same day, and within a short time after service of process, be sufficient? 9 Price 150.

And see *M'Quoick* v. *Davis,* 2 Chit. 164. Post. page 217.

(*b*) *Imparlance and Time for Pleading.*

1. The Court will not grant a special imparlance, unless to prevent injustice. *Crook* v. *Peat,* 2 Chit. 214.

2. In the Court of *Exchequer,* on all process served personally, returnable before the last return of any Term, pursuant to the statute 51 *Geo.* 3, c. 124, the plaintiff may file or deliver a declaration *de bene esse* at the return of such process, with notice to plead in eight days; judgment may otherwise be signed for want of a plea, on the plaintiff's entering an appearance according to the statute; such declaration having been delivered or filed, and notice given four days before the end of the Term, and a rule to plead entered. *Reg. Gen.* M. T. 53 *Geo.* 3, 8 Price 508.

(*c*) *Rule to Plead.*

1. If a declaration be amended in the same Term as delivered, though after a rule to plead has been given, it is not necessary to give a fresh rule to plead; although, if it be amended in a subsequent Term, a fresh rule is necessary. *Barry* v. *Rodney (Lord),* 2 Chit. 335.

(*d*) *Pleas, Sham or Issuable.*

See also Post. Div. VII. (c).

1. Pleas to a declaration upon a bill of exchange with counts for goods sold,—first, that part of the consideration of the bill was spirituous liquors sold at different times, in quantities less in value than 20*s.*; and secondly, that the plaintiff and defendant had accounted together, and that the latter had given the former a bill of exchange for the amount of the goods mentioned in the common counts, which bill is still outstanding and unsatisfied,—are issuable pleas, and cannot be treated as nullities, so as to entitle the plaintiff to sign judgment as for want of a plea. *Gaitskill* v. *Greathead,* 1 Dow. & Ryl. 359.

2. After the defendant had obtained an order for staying proceedings upon paying the debt and costs, which had been taxed, and having afterwards abandoned the order, pleaded a judgment recovered:—Held, that the plaintiff was at liberty to sign judgment; the plea filed being a fraud upon the Judge's order. *Hill* v. *Dyball,* 2 Chit. 292.

3. So, a plea of a judgment recovered of a Term before the cause of action arose, may be treated as a nullity, and the plaintiff is entitled to sign judgment without leave of the Court. *Lamb* v. *Pratt,* 1 Dow. & Ryl. 577.

4. But a plea of *nil debet* to an action of debt on a judgment, although a bad plea, cannot be treated as a nullity. *Anonymous,* 2 Chit. 239.

5. If a mere sham plea is so ingeniously drawn as to render it necessary for the plaintiff's attorney to consult counsel in order to know how to deal with it, and thereby cause delay and expense;—the Court will, on an affidavit that such plea is wholly false, permit the plaintiff to sign judgment as for want of a plea, and make the defendant or his attorney pay the costs. *Shadbolt* v. *Berthoud,* 1 Dow. & Ryl. 446.
S. C. 2 Chit. 335.

S. C. nomine Shadwell v. *Berthoud,* 5 B. & A. 750.

See also *Body* v. *Johnson,* 5 B. & A. 751. *n.*

6. Where to a declaration by an executor on a bond, delivered on the 1st *February,* the defendant pleaded an assignment of the bond on the 6th, before the death of the testator, and payment to the assignee: and the defendant was ruled to abide by his plea on the 16th; and the plaintiff in his replication took issue on the payment pleaded, and entered a *similiter* for the defendant, who struck it out and filed a demurrer to the replication:—Held, notwithstanding the plaintiff's delay, that he might sign judgment as for want of a plea, (the plea being a mere sham plea;) and the Court ordered the plaintiff's attorney to pay the costs. *Corbett* v. *Powell,* 1 Dow. & Ryl. 448.
S. C. 5 B. & A. 751. *n.*

7. So, where to a declaration of *assumpsit* for use and occupation, the defendant pleaded, "that after the making of the promises, and after the accruing of the causes of action mentioned in the declaration, and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff one ton weight of *Riga* hemp and one hundred weight of

Russia tallow, of the value of 30*l.*, in full satisfaction and discharge of the promises in the declaration, which the latter accepted in satisfaction. On an affidavit that this plea was in every respect false, the Court allowed the plaintiff to sign judgment as for want of a plea. *Richley* v. *Proone*, 2 Dow. & Ryl. 661. *S. C.* 1 B. & C. 286.

8. But it seems the Court will not compel a defendant to verify on affidavit a plea sworn by the plaintiff to be false, nor require the defendant's attorney to disclose the authority by which he pleads a sham plea. *Merrington* v. *A'Beckett*, 3 Dow. & Ryl. 231. *S. C.* 2 B. & C. 81.

(*e*) *Puis Darrein Continuance.*

Quære—Whether a plea of the plaintiff's bankruptcy since the last *continuance* is a dilatory plea, or a plea in bar? *Hartley* v. *Dixon*, 2 Chit. 561.

(*f*) *Delivering, filing, signing, withdrawing, and striking out Pleas.*

1. Where there is a general demurrer, it must be delivered and not filed, and the plaintiff may sign judgment when it has been only filed. *Fry* v. *Champneys*, 2 Chit. 295.

2. So, a general demurrer to part of a declaration, and the plea of the general issue to the rest, must be delivered to the plaintiff's attorney, and not filed with the clerk of the papers: if not, it is a nullity. *Dymock* v. *Stevens*, 3 Dow. & Ryl. 248.

3. A plea of *plene administravit* must be delivered. *Kent* v. *Monk*, 2 Chit. 295.

4. So must a *similiter*: if not, the defendant is entitled to sign judgment of *non pros.* *Hollis* v. *Buckingham*, 3 Dow. & Ryl. 1.

5. The signature of counsel to a plea must distinctly appear at the foot of such plea, as well as in the rule to plead several matters. *Grant* v. ———, 2 Chit. 319.

6. Where a defendant, in an action brought against him by the assignee of a bankrupt, pleaded the general issue, without giving notice of his intention to dispute the bankruptcy, he may, under a Judge's order, have leave to withdraw such plea, and plead *de novo*, with the notice required by the 49 *Geo.* 3, c. 121, s. 10. *Gardner* v. *Slack*, 6 Moore 489.

7. A defendant cannot withdraw a general demurrer and plead specially, unless a full and reasonable plea be shewn for his so doing:—Therefore, where, to a declaration on a replevin bond, the principal and sureties demurred generally, and the former had confessed a judgment in the original action;—the Court of C. P. would not allow one of the sureties to withdraw his demurrer and plead *per fraudem*, unless fraud were clearly shewn. *Elworthy* v. *Cowell*, 6 Moore 495.

8. On a motion to strike out a plea of the general issue, and file a plea that the plaintiff was convicted of felony; the defendant must produce a certified copy of the record of conviction, and prove the identity of the party convicted. *Croker* v. *Sivewright*, 2 Chit. 400.

IV. RULES, SUMMONSES, AND ORDERS OF JUDGES.

1. The rule of Court of *Michaelmas* Term, 11 *Geo.* 1, which directs that no summons shall be attended, nor any matters transacted before any Judge at Chambers, or elsewhere, during the sitting of the Court of *King's Bench* at *Westminster*, was discharged. *Reg. Gen.* M. T. 2 *Geo.* 4, 5 B. & A. 217.

And one of the Judges now attends daily at Chambers for those purposes, from half-past two until four.

2. A rule once disposed of, after full argument, cannot be opened again upon a suggestion that new matter has since come to the knowledge of the party, which might alter the decision of the Court. *Phillips* v. *Weyman*, 2 Chit. 265.

3. And the Court will not, at the close of a Term, grant a rule to shew cause at Chambers, where the party could have applied earlier. *Anonymous*, 2 Chit. 266.

4. But a rule to shew cause at the end of the Term, may, by special leave of the Court, be drawn up for three days, as four days are not necessary in all cases. *Anonymous*, 2 Chit. 372. *Bradshaw* v. ———, Id. ibid.

5. A rule obtained on *Saturday* for *Monday* may be enlarged of course. *Haines* v. *Aldrit*, 2 Chit. 372.

6. If a party incur the expense of resisting a rule to quash a writ for irregularity, and it turn out that the irregularity is not in the writ, but in the service, the Court of C. P. will discharge

the rule with costs. *Huggett* v. *Parkin*, 1 Bing. 65.

7. The mere circumstance that an agreement contains a proviso for its being made a rule of Court, will not of itself authorise that Court to take such a step. *Steers* v. *Harrop*, 1 Bing. 133.

8. In the Court of *Exchequer*, an order to shew cause cannot be made absolute till the next day after that on which cause is to be shewn, although it has been enlarged. *Solomon* v. *Cohen*, 9 Price 388.

V. IRREGULARITY.

(*a*) *Where waived.*

1. Irregularity in process, on the ground of a variance between the return of the writ and the day in the notice to appear, cannot be taken advantage of after the plaintiff has filed common bail, and also filed a declaration in the office, and given notice thereof to the defendant. *Hompay* v. *Kenning*, 2 Chit. 236.

2. So, where the defendant laid by until he received notice of executing a writ of inquiry, and then made a formal objection to the declaration, delivered *de bene esse*,—the Court held that he was too late in his application. *Minster* v. *Coles*, 2 Chit. 237.

3. But proceedings were set aside for irregularity, where no *latitat* was issued, notwithstanding three Terms' delay in moving the Court. *Anonymous*, 2 Chit. 237.

4. Where a wrong name of the defendant is inserted in the process, it is cured by his attorney's undertaking to appear. *Lowes* v. *Clarke*, 2 Chit. 240.

5. So, although the statute 2 *Geo.* 2, c. 23, makes the process on which the attorney's name and date are not indorsed, actually void, it is no objection to a motion to set aside the proceedings for irregularity on those grounds, that it has been made too late. *Mullett* v. *Alexander*, 2 Chit. 239.

6. Where a writ served in *November*, called on the defendant to appear in *June*: and subsequently to the service of the writ he admitted the debt, and requested time to pay it:—Held to be a waiver of the irregularity. *Rawes* v. *Knight*, 1 Bing. 132.

7. So, where a writ of *scire facias* had irregularly issued, to which an appearance was entered; and the plaintiff having delivered a declaration, to which a plea was filed, pending a motion to set aside the writ:—Held, that the defendant's plea was a waiver of the irregularity. *Sloman* v. *Gregory*, 1 Dow. & Ryl. 181.

8. It is irregular to serve the writ and the notice of declaration at the same time: but where the defendant omitted to take advantage of the objection until after judgment was signed, and a whole Term had elapsed, the Court would not set aside the judgment with costs. *M'Quoick* v. *Davis*, 2 Chit. 164.

9. And a defendant is in time to take advantage of such an objection, if he applies to the Court immediately after the next step the plaintiff takes. *Hill* v. *Parker*, 2 Chit. 165.

10. An application to set aside proceedings for irregularity in the Court of *Exchequer*, must be made in the first instance. *Edmond* v. *Ross*, 9 Price 5.

N.B.—*See the special circumstances detailed in that case.*

VI. PROCEEDINGS.

(*a*) *Where staid.*

1. The Court will not stay proceedings merely on an affidavit that the debt was under forty shillings. *Culliford* v. *Dyche*, 2 Chit. 395.

2. An action may be brought in the Court of Grand Sessions in *Wales* for goods delivered to a carrier in *London*, but received in *Caernarvon*; and the proceedings in an action in *Middlesex* were staid, the cause of action being under 40*s*. *Anonymous*, 2 Chit. 395.

And see *Eames* v. *Williams*, 1 Dow. & Ryl. 359. Post. next page.

3. So the Court will stay proceedings if a defendant be sued by bill as an attorney, when he is not one. *Nabb* v. ———, 2 Chit. 396.

4. Where, after the acceptor of a bill of exchange had offered to pay the debt and costs of the action commenced against himself, the plaintiff, who was an attorney and indorsee of the bill, brought another action against the drawer, who was his client,—the Court staid the proceedings, upon payment of the debt and costs of one action only. *Hodson* v. *Gunn*, 2 Dow. & Ryl. 57.

(*b*) *When set aside.*

1. If an action be prematurely brought, and before the cause of action has accrued, the Court will, on a summary application, set aside the proceedings

though such objection would afford no defence on the trial. *Kerr* v. *Dick*, 2 Chit. 11.

2. It is not necessary to use the term "irregularity" in a rule to set aside the proceedings for irregularity; and an irregular notice at the bottom of the copy of a writ, is not a ground to set aside the writ itself, but only the copy thereof. *Harvey* v. *Annett*, 2 Chit. 238.

3. No date to the notice of the declaration is necessary; and its being omitted is no ground for setting aside the proceedings for irregularity. *Anonymous*, 2 Chit. 238.

4. So, improper names of clerks on an old copy of a writ are immaterial, and form no valid objection for setting aside proceedings. *Anonymous*, 2 Chit. 239.

5. Where process appeared to be sued out in the name of *A.* by *B.*, neither of whom were attornies of the Court in which it was sued out, and *B.* had no authority from any other attorney to act in his name,—the Court of C. P. set aside the proceedings, and ordered *A.* and *B.* to pay the costs. *Hawkins* v. *Edwards*, 4 Moore 603.

6. Where the plaintiff sued the defendant in the *Surrey* County Court for a debt contracted in *Middlesex*, and having failed for want of jurisdiction there, proceeded in K. B.; and though the debt was under 40*s*., that Court refused to set aside the proceedings, the debt not being recoverable elsewhere. *Eames* v. *Williams*, 1 Dow. & Ryl. 359.

VII. JUDGMENT.

(*a*) *When and how signed.*

1. Judgment is not final on the officer's marking the record, but on his completing the taxation of costs by inserting their amount in the *allocatur*. *Butler* v. *Bulkeley*, 1 Bing. 233.

(*b*) *By Default.*

1. Where, in an action of trespass, the *venue* was laid in *Lancashire*, and the defendant suffered judgment by default; and after writ of inquiry executed, and final judgment signed, the defendant assigned error for want of an original writ;—the Court of C. P. ordered the plaintiff to docket and carry in the judgment roll, in order that the transcript might be made out. *Mason* v. *Grundy*, 6 Moore 567.

(*c*) *For want of a Plea.*

See also Ante. Div. III. (*d*)
See also *Rundell* v. *Champneys*, 1 Dow. & Ryl. 186. Post. page 222. *Derby (Mayor)* v. *Wheeldon*, 9 Price 150. Ante, page 215.

1. A plaintiff cannot treat a sham plea as a nullity, and sign judgment as for want of a plea, after he has given a rule to abide by the plea. *Draycott* v *Pilkington*, 5 M. & S. 518.

2. A plea of *nil debet* to an action of debt on a judgment, though a bad plea, is not to be treated as a nullity. *Anonymous*, 2 Chit. 239.

3. Where the plaintiff declared *de bene esse*, and the defendant pleaded in abatement before he had put in and perfected special bail; and the plaintiff, treating his plea as a nullity, signed interlocutory judgment:—Held regular. *Saunders* v. *Owen*, 2 Dow. & Ryl. 252.

4. Where a defendant, sued by bill, had by rule, "until two days before the *Essoign* day of the Term" to plead; and the *Essoign* day fell on a *Monday*; and the defendant having pleaded on the *Saturday*, the plaintiff signed judgment as for want of a plea;—the Court refused to set aside the judgment for irregularity. *Buckmaster* v. *Mackmahon*, 2 Dow. & Ryl. 538.

5. Where the plaintiff signed judgment as for want of a plea, because the rule to plead several matters was erroneously entitled *A.* v. *B.*, instead of *A.* v. *B. and another*;—the Court of C. P. set aside the judgment without costs, on an affidavit that the pleas were true, and that the defendant had a good defence to the action. *Christie* v. *Walker*, 1 Bing. 187.

6. And in that Court, where a defendant, under a rule *nisi* to plead several matters, files such pleas, annexing to them a copy of the rule *nisi*, indorsed with a notice, that a rule absolute to plead several matters would be served as soon as it was drawn up; the plaintiff cannot sign judgment as for want of a plea, although the time for pleading expired before the rule absolute was obtained. *Maynard* v. *Bright*, 3 Brod. & Bing. 256.

7. Where a plaintiff in the *Exchequer* would have been entitled to sign judgment for want of a plea, where the declaration had been delivered or filed, and notice given four days exclusively before the end of the Term in which the process was returnable,—he may now do so

on giving two days' notice exclusively, if a rule to plead has been given. *Reg. Gen.* H. T. 60 *Geo.* 3 & 1 *Geo.* 4, 8 Price 84.

(*d*) *Of Non Pros.*

See *Anonymous*, 2 Chit. 37. Ante, page 214.

1. Before the defendant can sign judgment of *non pros.* he must take out a rule to reply, as of the Term in which the judgment is signed: but where, after repeated applications made by him for the replication without effect, and after orders obtained for time to reply, the defendant signed judgment of *non pros.* without taking out a rule to reply, as of the Term in which judgment was signed,—the Court refused to set aside the proceedings, otherwise than on the terms of the costs being costs in the cause. *Brook* v. *Lawrence*, 2 Chit. 283.

2. If a *similiter* be not delivered, the defendant is entitled to sign judgment of *non pros. Hollis* v. *Buckingham*, 3 Dow. & Ryl. 1.

And see *Griffith* v. *Crockford*, 6 Moore 51. *infra.*

(*e*) *Nonsuit, and as in case of.*

1. Where a Special Jury cause had been standing in the paper three years, without any appointment or application to have it tried,—the Court refused to give the defendant judgment as in case of a nonsuit. *Rucker* v. *Ansley*, 2 Chit. 243.

2. But where the plaintiff in a Special Jury cause was under a peremptory undertaking to try at the next Assizes, the absence of eleven Special Jurymen was held a sufficient reason for his not proceeding to trial, (although a *tales* had been prayed, and some of the talesmen sworn;) and the Court of C. P. discharged a rule *nisi* for judgment as in case of a nonsuit, on a fresh peremptory undertaking by the plaintiff to try at the next Assizes. *Master* v. *Milner*, 1 Bing. 70.

3. Where issue was joined, and there was a rule to enter the issue, and notice of trial was given in one and the same Term for the Adjourned Sittings after that Term, and the plaintiff did not go to trial at those sittings, the defendant may sign judgment as in case of a nonsuit, in the following Term; and if no reason is assigned for not going to trial, the Court will not compel the defendant to accept a peremptory undertaking. *Walter* v. *Buckle*, 2 Chit. 244.

4. But where the plaintiff, having given a peremptory undertaking to try at a given Sittings, had set down his cause in the paper for those Sittings, (there being no prospect of the cause being then tried,) but omitted to carry the record into the Marshal's office:—Held, that the defendant was not entitled to judgment as in case of a nonsuit, for not proceeding to trial pursuant to the plaintiff's peremptory undertaking, as the latter was not bound to carry in the record. *Cope* v. *Holt*, 1 Dow. & Ryl. 180.

5. In an action for penalties for usury, a defendant is entitled to judgment as in case of a nonsuit, if it appears that a witness to the contract who is abroad, would not be permitted to give evidence even if he were in this country. *Bunyan* v. *Yerbury*, 1 Dow. & Ryl. 448.

6. In discharging a rule for judgment as in case of a nonsuit, for not proceeding to trial after issue joined, where the plaintiff assigned as a reason for not proceeding, that a suit in Equity was then depending between the defendant, an administrator, and the representatives of the deceased partner of the intestate; and stated, that the suit having been compromised, he was desirous of bringing the action to trial;—the Court of *Exchequer* ordered it to be done, on the terms of the plaintiff's giving a peremptory undertaking, and paying the defendant the costs of the application; refusing to order the costs to abide the event of the cause. *Coombe* v. *Mines*, 8 Price 94.

7. And in that Court, an order for judgment as in case of a nonsuit, for not proceeding to trial after a peremptory undertaking, being absolute in the first instance, may be set aside on motion, where good cause can be shewn. *Hutchinson* v. *Hutchinson*, 9 Price 389.

(*f*) *Where arrested*

1. A motion in arrest of judgment must be founded on the *Nisi Prius* record, (which must be taken from the issue roll,) and not on an apparent error in the copy of the declaration delivered to the defendant. *Newball* v. *Adams*, 8 Taunt. 335.

2. If the *similiter* be omitted to be added, the Court of C. P. will set aside the verdict. *Griffith* v. *Crockford*, 6 Moore 51. S. C. 3 Brod. & Bing. 1.

And see *Hollis* v. *Buckingham*, 3 Dow. & Ryl. 1. *supra.*

(g) *When set aside.*

1. It is no cause against a rule for referring a bill of exchange to the Master to compute principal and interest, to shew that the judgment signed was irregular; inasmuch as such irregularity must be the subject of a counter-motion, to set aside the judgment. *Marryat* v. *Winkfield*, 2 Chit. 119.

2. The Court allowed a judgment to be set aside for irregularity, in filing a declaration in chief before appearance was filed. *Anonymous*, 2 Chit. 165.

VIII. OF STRIKING OUT COUNTS.

1. The Court will refer it to the Master to determine whether superfluous counts in a declaration were introduced vexatiously. *Newby* v. *Mason*, 1 Dow. & Ryl. 508.

2. And where a declaration contained, besides the usual money counts, the *indebitatus* and *quantum meruit* counts for work and labour as an attorney, and two similar counts for work and labour generally; they referred it to the Master to strike out the latter for superfluity, before the issue was made up. *Gabell* v. *Shaw*, 1 Dow. & Ryl. 171. *S. C.* 2 Chit. 299.

3. But the Court of C. P. will not decide on the necessity of pleas, nor refer them to the Prothonotary, in a question which on the face of them appears to be one of doubt and nicety. *Trickey* v. *Yeandall*, 1 Bing. 66.

IX. PAPER-BOOKS, WHEN AND HOW RETURNED.

1. The order in the margin of the paper-book is peremptory, and it must be returned within the twenty-four hours; and though it be returned before judgment has been signed, yet the judgment is regular if signed after the expiration of the twenty-four hours. *Simmons* v. *Cope*, 2 Chit. 242.

X. SPECIAL CASES, DEMURRERS AND VERDICTS, WHEN AND HOW ARGUED.

1. A rule for a *concilium* obtained in Court on *Saturday*, and served on the night of that day, the Term ending on the *Wednesday* following,—is sufficient. *Bradshaw* v. ———, 2 Chit. 372.

2. The Court granted a rule *nisi* for the defendant to admit certain facts necessary to raise a question in a special case. *Buckle* v. *Hollis*, 2 Chit. 398.

3. So, they granted such rule for the *postea* to be delivered over to the prosecutor, and for him to be at liberty to enter up judgment; the defendant having neglected to settle the case reserved in a *quo warranto*, for usurping the office of mayor of *Colchester*. *Rex* v. *Smith*, 2 Chit. 398.

4. In C. P., if a verdict be found for the plaintiff with nominal damages, subject to the opinion of the Court on a special case to be drawn up by the plaintiff; if he refuses to do so, the case cannot be set down for argument, nor can the plaintiff be compelled to complete it; but the defendant may apply to set aside the verdict, and have a new trial. *Medley* v. *Smith*, 6 Moore 53.

5. And in the *Exchequer*, if counsel on either side appear to argue a special case on the day appointed by the rule for a *concilium*, and the counsel for the other party does not attend, the counsel in attendance will be heard, and the Court will give judgment in the absence of the other counsel; and they will not on any occasion permit the case to be opened again, for the purpose of giving the counsel who may have been absent an opportunity of arguing it; the necessary attendance of counsel in another Court not being considered a sufficient reason for his being absent from the Court of *Exchequer* on the day appointed for an argument there. *Harber* v. *Rand*, 9 Price 58.

6. If a cause, where there is joinder on demurrer and no argument, be struck out of the paper, no one praying judgment,—the cause must be entered *de novo*. *Anonymous*, 2 Chit. 402.

7. So, where counsel has had his brief in due time, and is accidentally or inadvertently absent at the time the common paper is called over; the Court will, on his moving for that purpose, allow him to take judgment as if he had been present. Id. ibid. (*n.*)

8. If a special verdict on a mixed question of fact and law, find facts from which the Court can draw clear conclusions, it is no objection to the verdict, that the Jury have not themselves drawn such conclusions, and stated them as facts in the case. *Monkhouse* v. *Hay*, 8 Price 256.

XI. RECORD, WHEN AND HOW PRODUCED.

1. A rule to produce the record was supported, where a perfect issue was taken, and no costs were given, where the rule was opposed in the first instance. *Anonymous,* 2 Chit. 241.

2. And such rule may be given, although the defendant has struck out the rejoinder of *nul tiel* record. *Gerrard* v. *Gaskell,* 2 Chit. 401.

XII. TRIAL.

(*a*) *Notice of.*

And see Ante. tit. NEW TRIAL.

1. Where a cause is made a *remanet* to the next Sittings, by an order of *Nisi Prius,* no fresh notice of trial is requisite; but it is otherwise if postponed by a rule of Court. *Shepherd* v. *Butler,* 1 Dow. & Ryl. 15.

2. In the *Exchequer,* notice of trial of causes entered for trial in *London* and *Middlesex,* within Term, must be given two days previous to the day of Sitting, except in cases of adjournment, and then notice must be given before eight o'clock in the evening of the preceding day. *Reg. Gen.* T. T. 29 *Geo.* 3, 8 Price 502.

3. And notices of trial there, must be given by attornies and clerks in Court, and be entered in the book of orders; and notices of such entries must be left on the seats of clerks in Court. *Reg. Gen.* H. T. 39 *Geo.* 3, 8 Price 503.

(*b*) *When put off.*

1. On motion to postpone a trial, upon an affidavit suggesting the absence of the copy of a judicial document in the *West Indies,* which is material and necessary on the trial; the Court would not try the admissibility of the evidence, where it was objected that when it arrived it could not be admitted, but postponed the trial until the document should arrive. *Mackenzie* v. *Hudson,* 1 Dow. & Ryl. 159.

2. But the Court will not put off the trial of a cause brought by the assignees of a bankrupt, because a petition is pending against the commission of bankruptcy. *Assignees of* ——— v. ———, 2 Chit. 411.

3. The affidavit to postpone a trial, on the ground of the absence of a witness, need not state the name of such witness, though it was suggested to be material and necessary. *Smith* v. *Dobson,* 2 Dow. & Ryl. 420.

4. And an affidavit, that a material witness is not likely to return till a day therein mentioned, impliedly swears that he is expected then, and is therefore sufficient to put off a trial. *Anonymous,* 2 Chit. 411.

(*c*) *Where had.*

1. The Court will remove an indictment for a misdemeanour from *Lancashire* to *Yorkshire,* if there is reasonable cause of suspicion or apprehension that justice will not be impartially administered in the former county. *Rex* v. *Hunt,* 2 Chit. 130.

(*d*) *At Nisi Prius.*

1. The practice of the *Hertfordshire* and *Sussex* Assizes is, not to permit any cause to be entered for trial with the marshal, after the rising of the *Nisi Prius* Court on the first day of its sitting, even though there be no *ne recipiatur* entered by the defendant. *Doe d. Sayer* v. *Rees,* 1 Dow. & Ryl. N.P.C. 6.

2. Sittings in *London,* in the Court of *Exchequer,* must be held at *Guildhall* on the second day next before the end of Term—in *Middlesex,* on the day before the end of Term—and the Sitting after Term, on the sixth day of the Sittings next after the end of each Term. *Reg. Gen.* E. T. 49 *Geo.* 3, 8 Price 507.

3. A Judge at *Nisi Prius* cannot in strictness nonsuit a plaintiff, unless he chooses to submit to it, where the main question in his case depends materially on the effect of the evidence adduced by him; and the submission to be nonsuited should be express:—And a nonsuit in such a case was set aside by the Court of *Exchequer,* notwithstanding the counsel for the plaintiff did not object to the nonsuit, nor intimate a desire that the case might be sent to the Jury. *Ward* v. *Mason,* 9 Price 291.

(*e*) *By Proviso.*

1. A defendant may carry the record of an issue directed by the Vice Chancellor down to trial, on the ground that the plaintiff endeavoured to delay it. *Bassett* v. *Osborne,* 6 Moore 473.

2. And where a parol submission was made by an infant plaintiff to a reference, before trial, and an arbitrator made an award in favour of the defendant;—on the plaintiff's refusing to comply with the terms of such award, the defendant may proceed to trial by proviso. *Godfrey* v. *Wade*, 6 Moore 488.

(*f*) *Verdict and Damages.*

1. Where a defendant on two successive trials of the same cause of action obtained a verdict,—the Court set aside the last verdict, and entered a nonsuit, in order that the plaintiff, who claimed title to property which savoured of the realty, might not be for ever concluded from agitating his right. *Lee* v. *Shore*, 2 Dow. & Ryl. 198. *S. C.* (not *S. P.*) 1 B. & C. 94.

2. So, after a verdict found for the defendant, the Court will, in its discretion, order a nonsuit to be entered, in order that the plaintiff may not be precluded from bringing another action:—Where, therefore, a plaintiff did not appear at the trial, the record having been taken down by proviso, and a verdict was taken for the defendant by mistake instead of a nonsuit; the Court would not allow the plaintiff to set aside the verdict, unless he consented that a nonsuit should be entered. *Hodgson* v. *Forster*, 2 Dow. & Ryl. 221. *S. C.* 1 B. & C. 110.

3. A verdict will not be entered for either party, founded on an apparent inconsistency in the terms of it, in the case of an issue directed by the Court of *Exchequer* to try a fact; because it would be useless, considering the object of such a trial:—and that Court, in the ultimate disposal of the subject matter of the suit, may correct any such inconsistency, if necessary so to do. *Robinson* v. *Williamson*, 9 Price 136.

PRISONER.

I. PRIVILEGES AND DISABILITIES OF.

See also tits. { HABEAS CORPUS. Ante, page 147. INSOLVENT DEBTORS. Ante, page 160.

1. A prisoner in custody for a contempt is not entitled to the rules of the *King's Bench*, except in a case where he is dangerously ill, and might die through close confinement. *Hall* v. *Arnold*, 2 Dow. & Ryl. 709.

II. DECLARATION AGAINST—WHEN FILED OR DELIVERED.

1. Where the plaintiff lodged a detainer against the defendant in custody on the 21st of *January*, by filing a declaration, and delivering a copy entitled of *Michaelmas* Term, and at the same time demanded a plea; and on the 23d of the same month entered a rule to plead, and signed judgment on the 28th as for want of a plea:—Held, that the judgment was regular. *Rundell* v. *Champneys*, 1 Dow. & Ryl. 186.

III. WHEN AND HOW CHARGED IN EXECUTION.

And see Post. Div. V.

1. Where, after declaration, plea, and issue joined in *Trinity* Term, the defendant on the 6th *November* gave a *cognovit* for the debt and costs, and on the 11th surrendered himself in discharge of his bail; and in *Hilary* Term the plaintiff entered up final judgment:—Held, that he might charge the defendant in execution in *Easter* Term, though he might have been previously supersedable. *Morland* v. *Weston*, 3 Dow. & Ryl. 31.

2. Where the defendant, after surrendering in discharge of his bail, in an action in C. P., was committed to a criminal custody for a misdemeanour, and so continued; that Court refused to discharge him from the action, because the plaintiff had omitted to charge him in execution within two months after his urrender;—and that Court has no jurisdiction to take a defendant out of a criminal custody, because it has none to remand him to such custody. *Freeman* v. *Weston*, 1 Bing. 221.

IV. ALLOWANCE TO, HOW MADE.

1. Where, in a deed of dissolution of partnership, a power was reserved to the remaining partners to use the name of the retiring partner in the prosecution of all suits; and judgment had been obtained in an action by all the partners before the dissolution:—Held, that the remaining partners were authorised, under that power, to give the defendant a note for the payment of his sixpences, under the Lords' Act, on behalf of themselves and the retiring partner. *Burton* v. *Issitt*, 5 B. & A. 267.

2. A rule calling on the treasurer of the county of *Middlesex* to pay over money to the treasurer of the county of *Surrey* for the expense of relieving a prisoner in the *King's Bench* and *Marshalsea* prisons, under the statute 53 *Geo.* 3, c. 113, s. 6, was refused; because a demand and refusal were not sworn to. *In re Mainwaring*, 2 Chit. 409.

V. WHEN AND ON WHAT GROUNDS SUPERSEDED OR DISCHARGED.

See also tits. { HABEAS CORPUS. Ante, page 147. INSOLVENT DEBTORS. III. Ante, page 160.

And see *In re Rochfort*, 1 Bing. 255. Ante, page 191.

1. Whereas by a rule made in the Court of *King's Bench* in *Trinity* Term 56 *Geo.* 3, it was ordered that the marshal of the *Marshalsea* of that Court should present to the Judges thereof in their chamber at *Westminster-Hall*, within the *first four* days of every Term, a list of all such prisoners as were supersedeable, shewing as to what actions and on what account they were so, and as to what actions (if any) they still remained not supersedeable. And whereas it sometimes happened that prisoners who would be supersedeable, according to the general rules and practice of the Court, might not be entitled to their *supersedeas* or discharge, by reason of some special matter unknown to the marshal; and it being expedient that such special matter should in all cases be made known to him, in order to the better preparing the lists required by the recited rule:—It was ordered by the Court, that if by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any prisoner then or thereafter to be detained in the actual custody of the marshal, was not then or thereafter might not become entitled to a *supersedeas* or discharge, to which such prisoner would, according to the general rules and practice of that Court, be otherwise entitled for want of declaring, proceeding to judgment, or charging in execution within the times prescribed by such general rules and practice; that then and in every such case, the plaintiff or plaintiffs, at whose suit such prisoner then was, or thereafter might or should be so detained in custody, should, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the marshal, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and that the marshal should forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and should also present to the Judges of that Court, from time to time, a list of all the prisoners to whom such special matter should relate, shewing such special matter, together with the list of prisoners supersedeable, as required by the said recited rule. *Reg. Gen.* M. T. 57 *Geo.* 3, 5 M. & S. 522.

2. To prevent unnecessary expenses to plaintiffs suing in the Courts of K. B. and C. P., in cases of notice given by prisoners of their intention to apply for their discharge, under any act made for the relief of Insolvent Debtors,—it was ordered, that after such notice given to any plaintiff, no prisoner should be superseded or discharged out of custody at the suit of such plaintiff, by reason of his forbearing to proceed against him according to the rules and practice of those Courts, from the time of such notice given, until some rule or order should be made in the cause in that behalf by

those Courts, or one of the Judges thereof; and that a copy of this rule should be hung up in the places where rules are usually hung up. *Reg. Gen.* E. T. 3 *Geo.* 4, 5 B. & A. 799.
1 Dow. & Ryl. 472.
2 Chit. 377.

Same Rule, M. T. 3 *Geo.* 4, 1 Bing. 120.

3. The plaintiff having omitted to charge the defendant in custody within three Terms after judgment, and he afterwards surrendered in discharge of his bail:—Held, that he was supersedeable, although he had removed himself into another custody by *habeas corpus* in another action. *Morris* v. *Magrath*, 3 Brod. & Bing. 301.

4. Where the plaintiff arrested the defendant and discontinued the action, and paid him the costs incurred; but before his discharge out of custody lodged a detainer against him for a larger debt arising out of the same cause of action:—Held, that such detainer was irregular, and that the defendant was entitled to be discharged out of custody on filing common bail, as it was not like the case of a fresh arrest; which cannot be made till the costs have been paid. *White* v. *Gompertz*, 1 Dow. & Ryl. 556.
S. C. 5 B. & A. 905.

5. A prisoner cannot be discharged under the Lords' Act, where he has before taken the benefit of the general insolvent Act. *Galossis* v. *Longhurst*, 2 Chit. 354.

But see the statute 52 *Geo.* 3, c. 34, s. 2.

6. Where a defendant in custody had been charged with a declaration as of *Trinity* Term, and absconded during the long vacation, but did not return into custody until *Hilary* Term following;—the Court of C. P. refused to discharge him, although the plaintiff had not signed judgment before the end of such *Hilary* Term. *Grimes* v. *Joseph*, 4 Moore 380.

PRIZE MONEY.

1. *A.*, when a prize was taken by a Custom-house cutter, bore the commission of mate, but was *acting commander* on board under an order from the Commissioners of Customs, communicated by letter to the comptroller and collector of the port to which the cutter belonged, and by them communicated by letter to *A.*, directing him to take care that the cutter should be kept at sea *under his command*, to the end that the service might not suffer, *until another commander should be appointed*:—Held, that he was entitled to the commander's share under the king's warrant of the 26th *November*, 1803, referring to a former warrant of the 4th *July* in that year, which described the share to be distributed amongst the commanders, officers, and crew of the vessel making the capture, as *a reward for that service*; although the former commander, *whose commission as such* had been before withdrawn and cancelled by order of the Commissioners on some supposed misconduct, and who had consequently left the cutter, but was afterwards restored, and a new commission granted to him, bearing the date of his former commission, which was anterior to the capture:—Held also, that *A.* was not entitled to the full share of commander without deducting the share of *a deputed mariner*, who was on board at the time of the capture, but who, at the time of *A.*'s beginning to act as commander, acted as mate, and was acting as such, and not as a deputed mariner, at the time of the capture, but without any commission or authority to act as mate. *Taylor* v. *Pill (in error)*,
8 Taunt. 805.

And see *S. C.* K. B. 11 East 414.

2. Where the plaintiff, in 1811, serving on board a king's ship on a foreign station, was appointed boatswain by the captain, and so continued till 1815, when the plaintiff assigned prize-money to the defendant, which the former was entitled to receive when due; but the warrant of the navy board, confirming the plaintiff as boatswain, was not signed till after the assignment:—Held, that the plaintiff was not within the operation of the statutes 45 *Geo.* 3, c. 72, 49 *Geo.* 3, c. 108, and 55 *Geo.* 3, c. 60, which make assignments of prize-money by petty officers and seamen void. *Wellard* v. *Moss*, 1 Bing. 134.

PROCEDENDO.

1. Where a prisoner was convicted of perjury in an inferior jurisdiction, and the sentence of transportation was entered on the record as follows:—"Wherefore, all and singular the said premises being seen by the said Justices here, and fully understood, it is therefore *ordered*, that he the said *L. K.* be transported to the coast of *New South Wales*, or some one or other of the islands adjacent, for and during the term of seven years, &c."—Held, on error brought, that this was not a judgment, but merely an order; and the Court awarded a *procedendo* commanding the Court below to pronounce the proper judgment, and in the mean time admitted the prisoner to bail. *Rex* v. *Kenworthy*,
3 Dow. & Ryl. 173.
S. C. 1 B. & C. 711.

PROHIBITION.

I. TO SPIRITUAL AND ECCLESIASTICAL COURTS.

1. A prohibition lies to the Consistory Court, if the ordinary proceeds to hear exceptions to an inventory exhibited by an executor. *Henderson* v. *French*,
5 M. & S. 406.

2. So, it does to an Ecclesiastical Court on behalf of the plaintiff there, in a suit for tithes, where a *modus* was pleaded. *Hayward* v. *Culliford*,
2 Chit. 362.

II. TO COURTS OF INFERIOR JURISDICTION.

1. It seems that a prohibition will not lie to restrain the Court of Admiralty from taking cognizance of a suit instituted in that Court by the majority of ship-owners, as against an individual owner, to restore the possession of the ship's registry, in order that she may sail on her voyage. *Anonymous*,
2 Chit. 359.
S. C. 3 Dow. & Ryl. 178. (*n.*)

2. Nor will it lie to restrain that Court from proceeding in a cause of possession for the restoration of a vessel to a person claiming as true owner, against one alleged to be a wrong-doer. *Baxter* v. *Blanshard*,
3 Dow. & Ryl. 177.

QUO WARRANTO.

I. INFORMATIONS.

(*a*) *How, for what Purposes, and on whose Application granted.*

See CORPORATION, Ante. *passim*.

1. A *quo warranto* was granted against a defendant for exercising an office in a corporation after he had resigned by writing, but without deed. *Rex* v. *Payne*,
2 Chit. 367.

2. And a *quo warranto* was granted for exercising the office of a Justice of the Peace. *Rex* v. ———,
2 Chit. 368.

3. So, an information in the nature of a *quo warranto*, is within the statute 9 *Anne*, c. 20, and lies against the bailiff of a borough by prescription, sending members to Parliament, though he be not a corporate officer. *Rex* v. *Highmore*, 1 Dow. & Ryl. 438. *S. C.* 5 B. & A. 771.

4. And a rule *nisi* for a *quo warranto* was granted, where there was a continuing incompatibility, though the party held the offices of capital burgess and town-clerk for more than six years. *Rex* v. *Lawrence*, 2 Chit. 371.

5. It is no objection to a *quo warranto*, that it is a friendly proceeding, in order that the party might disclaim. *Rex* v. *Marshall*, 2 Chit. 370.

6. The rule is absolute in the first instance for an inspection of the books of a corporation, where a *quo warranto* is depending. *Rex* v. *Travannion*, 2 Chit. 366.

(*b*) *On what Grounds refused.*

1. A *quo warranto* does not lie against the clerk of the Commissioners of Land-tax; but if he is improperly elected under the statute 43 *Geo.* 3, c. 99, a *mandamus* will lie to the Commissioners to admit the person who had the majority of legal votes. *Rex* v. *Thatcher*, 1 Dow. & Ryl. 426.

2. A retail baker is not ineligible as mayor, although the officers of the borough for which he was appointed, settle the assize of bread there. *Rex* v. *Deane*, 2 Chit. 370.

3. Where, in an application for a *quo warranto* against a constable, it was merely sworn that there had been a custom in the town to elect a constable in a particular mode:—Held to be insufficient, as it was not stated that such custom was immemorial. *Rex* v. *Lane*, 5 B. & A. 488. *S. C.* 1 Dow. & Ryl. 76.

4. And the Court will discharge a rule for a *quo warranto*, where the relator, on an application for the information, is the legal adviser of the defendant, and advised him that he had been duly elected. *Rex* v. *Payne*, 2 Chit. 369.

(*c*) *Proceedings in, relative to Pleadings, Evidence, and Judgment.*

1. *Quære*—If the statutes 32 *Geo.* 3, c. 58, and 9 *Anne*, c. 20, enabling defendants in a *quo warranto* to plead double, are confined to corporate offices. *Rex* v. *Highmore*, 1 Dow. & Ryl. 438. *S. C.* 5 B. & A. 771.

2. The Court admitted a party to defend the defendant's title in a *quo warranto*. *Rex* v. *Marshall*, 2 Chit. 370.

3. And under particular circumstances, they allowed a disclaimer to be entered without costs. *Rex* v. *Holt*, 2 Chit. 366.

(*d*) *Costs in.*

1. The defendant in a *quo warranto* information against him, to shew by what authority he held the office of registrar and clerk of the Court of *Requests* of the city of *Bristol*, is not entitled to costs under the statute 9 *Anne*, c. 20, s. 5. *Rex* v. *Hall*, 2 Dow. & Ryl. 341. *S. C.* 1 B. & C. 237.

RECOGNIZANCE.

When Recognizances may be estreated, see tit. ESTREAT. Ante, page 123.

For Pleas to a Recognizance against Bail, See tit. BAIL. I, (c.) Ante, page 41. See also SCIRE FACIAS. Post.

1. Parties entering into a recognizance under the statute 28 *Geo.* 3, c. 52, providing for petitions against undue returns of members of Parliament, are not bound to attend the committee to the last moment, or to appear to hear the determination of such committee, as to whether the petition be frivolous or vexatious. *Ex-parte Williams*, 8 Price 3. See *S. C.* Ante, page 170.

RECOVERY.

I. BY WHOM AND HOW SUFFERED, AND WHO ARE BARRED THEREBY.

1. *A*. being seised of an estate in fee, devised the same to his son *B*. for life; remainder to the son and sons of the said *B*. in tail, in such shares and proportions as he should by will appoint, with other remainders over. *B*. had four sons, *C. D. E.* and *F*. By indentures of lease and release, for the purpose of barring all estates tail, and extinguishing the power of appointment so vested in *B*., he and three of his sons, *C. D.* and *E*., conveyed the entirety of the premises to *G. K.* as tenant to the *præcipe*, so that one or more recoveries might be suffered, in which *B. C. D.* and *E*. should be vouchees. A recovery of the entirety of the premises was afterwards suffered, in which *C*. and *D*. were vouched. By indentures of lease and release, for the same purposes as before, *B*. and his sons *C. D. E.* and *F*. conveyed all the premises to *G. K.*, as tenant to the *præcipe*, so that one or more recoveries might be suffered, in which *C. D. E.* and *F*. should be vouchees. A second recovery was suffered of the same premises, in which *F*. was vouched; and a third was also suffered, in which *E*. was vouchee. *B*. died without executing any appointment:—Held, that by these conveyances and recoveries, the estates tail in *C. D. E.* and *F*. were well barred; for that, although the interest of each of them was peculiar, it did not exhaust the entirety, but left an interest in each of the others who were not vouched, and which was not intended to be affected; and that an estate of freehold, co-extensive with such unaffected interests, remained in the tenant to the *præcipe*, so as to give validity to the last recovery. *Collyer* v. *Mason*, 5 Moore 597.

II. ACKNOWLEDGMENT, HOW TAKEN.

1. The necessary documents for taking the acknowledgment of a recovery in *Holland* were engrossed on parchment and sent to Commissioners there; and by the law of that country, all documents bearing the certificate of a *Dutch* notary require a *Dutch* stamp, which can only be imprinted on paper. The documents were accordingly returned written on paper, so stamped and certified:—Held, that the acknowledgment and proceedings so written on paper could not be allowed;—but the Court of C. P. enlarged the return to the *dedimus*, and permitted the writ to be resealed, in order to endeavour to get the documents properly executed on parchment, and returned during the Term; which was accordingly done, when the recovery was permitted to pass in the usual way. *Tatham* Demandant, *Baxendale* Tenant, *Tabor* Vouchee. 4 Moore 481.

2. So, in a recovery, where the vouchees resided in *Guernsey*, and the acknowledgment was taken before Commissioners there, who neglected to indorse their names on the *dedimus*;—the Court would not permit the recovery to pass, but ordered the documents to be returned to them for such indorsement. *Watts* Demandant, *Milne* Tenant, *Pickford* Vouchee, 6 Moore 69.

III. WHEN AND HOW PASSED.

1. The Court of C. P. permitted a recovery to pass, although alterations had been made in the caption of the warrant of attorney, the affidavit of the acknowledgment, and the notarial certificate. *Smale* Demandant, *Bremridge* Tenant, *Adams* Vouchee, 1 Bing. 72.

2. So, a recovery was allowed to pass, although the words "*their attorney*" were omitted in the warrant of attorney given by two vouchees. *Wood* Demandant, *Aldersey* Tenant, 1 Bing. 212.

3. And the Court permitted a recovery to be completed *nunc pro tunc*, which had been delayed in consequence of one of the vouchees having left this country and resided abroad, on account of ill health. *Carr* Plaintiff, *Phillips* Demandant, *Evans* Vouchee, 5 Moore 557.

IV. AMENDMENT OF.

See also Ante. tit., FINE. III. page 140.

1. It was ordered by the Court of C. P. that in future, on motions to amend a recovery, an affidavit must be produced stating that the possession had followed the execution of such instrument. *Bisgood* Demandant, *Brutton* Tenant, *Ivee* Vouchee, 6 Moore 259.

2. The name of the demandant may be changed without any affidavit of intention, or identity of the party or premises. *Bird* Demandant, *Quilter* Tenant, *Tindal* Vouchee, 8 Taunt. 556.

3. And the writ of entry may be amended by altering the name of the demandant, and transposing that of the tenant; on an affidavit that all the parties interested were living, and assented to the amendment. *Edge* Demandant, *Taylor* Tenant, *Warren* Vouchee, 4 Moore 514.

4. So, where the name of the vouchee was inserted by mistake in the *præcipe*, instead of that of the tenant,—the Court allowed it to be amended by substituting the name of the latter for that of the former. *Cox* Demandant, *Ince* Tenant, *Gill* Vouchee, 1 Bing. 22.

5. But they will not allow an amendment, by transposing the names of the demandant and tenant, unless the documents relative to its being suffered be produced. *Allen* Demandant, *Hexley* Tenant, *Massey* Vouchee, 6 Moore 46.

6. By a recovery suffered in 1759, premises were described as consisting of "a mill, lands, and hereditaments, in the parish of *M.*" By a deed of bargain and sale in 1771, "all the tithes and hereditaments, except in *M.*, were conveyed;" which, it was stated, were comprised in the recovery of 1759, and were accordingly omitted in the latter:—Held, that such tithes did not pass by the first recovery; but as it appeared that the tithes of all the vouchee's estates were intended to pass by the latter, except those which were supposed to have been included in the first,—the Court permitted the latter to be amended by inserting the "tithes in *M.*" *Ward* Demandant, *Palmer* Tenant, *Coventry* Vouchee, 6 Moore 224.

7. But they refused to allow the amendment of two recoveries, the one suffered in the reign of *Will. & Mary*, and the other in *Geo.* 1, by the insertion of the word "tithes;" it not appearing that the parties were in possession of such tithes at the time the recoveries were suffered; although the word "hereditaments" was contained in the deed to lead the uses. *Phillips* Demandant, *Noune* Tenant, *Lisle* Vouchee, 4 Moore 604.

8. A recovery may be amended by substituting an advowson for a rectory, if it appears by the deed to lead the uses, that the former was intended to pass. *Haller* Demandant, *Woolley* Tenant, *Palmer* Vouchee, 6 Moore 53.

9. So, by substituting the words "advowson of the church," for the word "rectory." *Coore* Demandant, *Spragg* Tenant, *Blackburn* Vouchee, 8 Taunt. 333.

10. Or by inserting "a fee farm rent." *Times* Demandant, *Meredith* Tenant, *Edwards* Vouchee, 5 Moore 474.

11. Or the words *meadow* and *pasture*. *Fricker* Demandant, *Fairbank* Tenant, *Bishop* Vouchee, 1 Bing. 22.

12. And if marsh land be described as land generally, it may be amended by inserting the word "marshy" before "land," on an affidavit stating how the premises had been occupied since the recovery was suffered. *Phillips* Demandant, *Field* Tenant, *Rolfe* Vouchee, 5 Moore 98.

13. But a recovery cannot be amended by adding to the description, where the description is already sufficient to pass the lands. *Howman* Demandant, *Orchard* Tenant, *Barney* Vouchee, 8 Taunt. 683.

14. Nor by increasing the quantity of land, if the deed to lead the uses contains sufficient terms to shew that it was intended to pass; nor is it necessary that the exact admeasurement should be inserted in such deed. *Marryatt* Demandant, *Elmore* Tenant, *Shard* Vouchee, 6 Moore 50.

15. But a recovery may be amended by describing the premises to be situate "in the parish of *A.* in the city of *B.*, and in the parish of *C. in the county* of the same city," according to the deed to lead the uses, although they were described in the exemplification of the recovery as being situate in "the parishes of *A.* and *C. in the city* of *B.*" *Bisgood* Demandant, *Brutton* Tenant, *Ivee* Vouchee, 6 Moore 259.

16. So, by inserting the words "the county of the," before those of "city of C.," on an affidavit stating that the premises intended to pass were situate in the *county of that city*, and so described in the deed to lead the uses, but by mistake were described in the recovery as being in the city of C. *Hill* Vouchee, 6 Moore 259. (*n.*)

RELEASE.

See *Amory* v. *Broderick*, 1 Dow. & Ryl. 361. *S. C.* 5 B. & A. 712. 2 Chit. 329. Ante. page 94.

1. The defendant having given the plaintiff a promissory note for 40*l.*, in consideration that he would withdraw an execution from the premises of the former, the plaintiff executed a general release of all suits, which, after reciting the agreement to withdraw the execution, &c., proceeded to state, "that in pursuance of the said agreement, and in consideration of the said sum of 40*l.* *being now so paid, as hereinbefore is mentioned:*"—Held, in an action on the promissory note which had been dishonoured, that the release was no bar to the suit, as the general words were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.* *Lambourne* v. *Cork*, 1 Dow. & Ryl. 211. *S. C. nomine Lampon* v. *Corke*, 5 B. & A. 606.

2. Where the assignee of a bankrupt brought an action upon the statute 9 *Anne*, c. 14, to recover money lost by the bankrupt to the defendants at play; and the bankrupt, who had obtained his certificate, was called as a witness to prove the loss; and in order to render him competent, the bankrupt released the assignee of all claim upon the surplus fund, if any; and all the creditors who had proved, released the bankrupt from all future claims; and the assignee (who was not a creditor) executed a like release:—Held, that after the expiration of more than a year from the date of the commission, it was to be presumed that all the creditors had proved, and that a release signed by all who had proved, was binding as a release by every one of the creditors:—Held also, that such release did not destroy the assignee's right of action. *Carter* v. *Abbott*, 2 Dow. & Ryl. 575. *S. C.* 1 B. & C. 444.

3. A plea *puis darrein continuance* of a release, by one of the lessors of the plaintiff, is bad on general demurrer;—and the Court would not give leave to amend. *Doe d. Byne* v. *Brewer*, 2 Chit. 323.

REMAINDER.

See Ante. tits. { DEVISE. VII. page 107. DISCONTINUANCE, page 110.

REPLEVIN.

I. DUTY OF SHERIFF IN ENTERING PLAINT.

1. Where a sheriff or his deputy neglects to enter a plaint in replevin in the county Court for *damage feasant*; the Court will not compel him to do so on motion. *Ex-parte Boyle*, 2 Dow. & Ryl. 13.

II. BOND AND SURETIES.

See also *Hallett* v. *Mountstephen*, 2 Dow. & Ryl. 343. Post. page 232.

1. *A.* and *B.* were in partnership as attornies. *A.* alone was appointed replevin clerk to the sheriff:—Held, that an action brought to recover the expenses of preparing a replevin-bond must be brought by *A.* alone, although it was executed in the office where he and *B.* carried on their joint business. *Brandon* v. *Hubbard*, 4 Moore 367.

2. Where a replevin-bond was conditioned that the defendant should prosecute his action with effect against the plaintiff for taking and unjustly detaining the goods, chattels, *and growing crops of corn* of the defendant; and should make return thereof, if a return should be adjudged; and should indemnify the sheriff and his officers for replevying the said goods and chattels: and the declaration stated the condition to be, that the defendant should prosecute with effect his action against the plaintiff for taking and unjustly detaining the defendant's *goods and chattels* in the said condition mentioned; and should make return thereof, if a return should be adjudged; and should indemnify the sheriff and his officers for replevying the said goods and chattels:—Held, that this was no variance. *Glover* v. *Coles*, 1 Bing. 6.

3. If judgment be given against the plaintiff in replevin for not prosecuting his suit with effect, his sureties on the bond will be answerable to the avowant, notwithstanding he has afterwards proceeded on the 17 *Car.* 2, c. 7, s. 2, and obtained a judgment under a writ of inquiry, in pursuance of that statute, to recover the arrearages of rent and costs. *Turnor* v. *Turner*, 4 Moore 606.

4. Where one of the sureties in a replevin-bond was a material witness in the cause, another surety may be substituted for him, on giving the defendant's attorney notice of the application to the Court of C. P. for a rule for such substitution. *Bailey* v. *Bailey*, 1 Bing. 92.

III. PLEADINGS.

1. An avowry by one of several coheirs in gavelkind in his own right and a cognizance as the bailiff of others,—is sufficient, without averring any authority from them to distrain. *Leigh* v. *Shepherd*, 5 Moore 297.

2. A plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Laycock* v. *Tufnell*, 2 Chit. 531.

Quære—Whether an avowry, stating the plaintiff to have held under a demise, at the yearly rent of 317*l.*, without stating when the rent was payable, does not mean that the rent was payable yearly? 2 Chit. 531.

3. To a cognizance for rent in arrear,—Plea in bar, that the defendant, on a former occasion, made a distress for the same rent, and took goods liable to distress, sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent:—Held ill on special demurrer, assigning for cause that the plea did not shew that the rent was satisfied by the former distress. *Hudd* v. *Ravenor*, 5 Moore 542.

And see *S. P. Lingham* v. *Warren*, 4 Moore 409.

4. Where the claim of a plaintiff in replevin was founded on a custom to demise right of common appurtenant without deed, and he pleaded in bar a custom to demise the right of common generally, and a demise according to the custom:—Held, on general demurrer, that even supposing such a custom to be good, the plea was bad on the face of it, for alleging a demise of a thing by grant without a *profert* of the deed of grant, or without alleging a custom to demise without deed, in lieu thereof. *Lathbury* v. *Arnold*, 1 Bing. 217.

5. In an action by the assignee of the sheriff on a replevin-bond, conditioned for the plaintiff in replevin to appear at the County Court and prosecute his suit with effect, and make a return of the goods distrained, if it should be adjudged; and the plaintiff in replevin, after removing the plaint into the Court of

C. P., became nonsuited:—Held, that he had thereby not prosecuted his suit with effect, and that the condition of the bond was broken; that the avowant had his election of proceeding by a writ *de retorno habendo*, or issuing a writ of inquiry under the statute 17 *Car.* 2, c. 7, s. 2.—Therefore, where, to a declaration against one of the sureties on the bond, averring that the plaintiff in replevin did not prosecute his suit with effect;—a plea, stating the writ of inquiry and judgment to recover the arrears of rent, found under 17 *Car.* 2, is no bar to the action on the bond, and is bad on general demurrer; it not shewing that any execution had issued on the judgment, or that the sum recovered had been levied and paid to the avowant before action brought. *Turnor* v. *Turner*, 4 Moore 606.

6. Plea in bar to an action of replevin, "that long *before the said time when, &c.*, to wit on, &c., at, &c., the defendant demised the *locus in quo* to the plaintiff:"—Replication, "that long before the said time when, &c., to wit on, &c., at, &c., the defendant did not demise *modo et formâ*;"—on demurrer, that the replication was a negative pregnant, and made the day and place of the demise, which were immaterial, part of the issue:—Held, that the words "*before the said time when, &c.*," were the material part of the traverse; and proof of a demise at any time before the distress, would maintain the action; and that the day and place subsequently mentioned were immaterial. *Cuff* v. *Coster*, 1 Dow. & Ryl. 42. *S. C.* 2 Chit. 296.

7. To a declaration of replevin for taking the plaintiff's goods, the defendants avowed that one *T. P.* for two years next before and ending on the 6th *April*, 1819, and from thence until, &c., was tenant to them, by virtue of a demise to him made, at the yearly rent of 298*l.*, payable half-yearly; and that one year's rent being due from him to them, on the day aforesaid, they well avowed the taking, &c.,—Plea in bar, that one *W. P.*, before the making of the demise in the avowry mentioned, and before the defendants had any thing in the premises, to wit, on the 6th *April*, 1815, was seised thereof in fee; and being so seised, demised the same to the plaintiff, to hold to him for one year, and so from year to year, so long as they should respectively please, at the yearly rent of 20*l.*;—That *W. P.* being so seised, the plaintiff entered under the demise made to him, and so remained until the said time when, &c.:—That *W. P.*, being entitled to the reversion, on the determination of the demise to the plaintiff, on the 1st *December*, 1815, demised the premises to *T. P.* for fourteen years, at the yearly rent of 298*l.*, payable half-yearly:—That after the making that demise, and, during the continuance of the plaintiffs, *W. P.* conveyed the premises to the defendants in fee; and that they had nothing therein at the time of making the distress, except by virtue of that conveyance, and subject to the previous demise to the plaintiff;—That *T. P.* did not enter under the demise to him; but that the plaintiff was in possession by virtue of that made to him, and held the same of the defendants, as assignees of *W. P.*, and paid them the yearly rent of 20*l.* so reserved under that demise, which was still subsisting and undetermined;—That none of that rent was in arrear from the plaintiff; but that all arrears thereof were paid at the time of the distress, and that the defendants took the plaintiff's goods of their own wrong:—without this, that *T. P.*, during the whole or any part of the time in which the rent in the avowry was alleged to be in arrear, held as tenant to the plaintiff, otherwise than as in the plea was alleged.—Replication, that *T. P.*, during the whole of the time in which the rent in the avowry was alleged to be in arrear, held as tenant to the defendants, as they had in their avowry alleged. — Special demurrer thereto, assigning for causes, that the defendants had not traversed the making of the demise by *W. P.* to the plaintiff, or the continuance thereof; or that the plaintiff, when the arrears of rent for which the distress was made, held the premises by virtue of that demise;—and that it was not alleged, that such demise had ceased, nor was it shewn that any of the rent reserved under it remained unpaid; and that the defendants had not taken issue on the traverse offered by the plea in bar, nor sufficiently denied, confessed, or avoided the matters therein alleged:—that no proper issue was taken by the replication; and that it attempted to put in issue a fact immaterial, and not issuable with relation to the matters in the said

plea.—The Court overruled the demurrer, as the replication put the material point in issue between the parties, *viz.* whether *T. P.* held under the defendants, as stated by them in their avowry; and as the facts alleged in the plea in bar, previous to the traverse, were matter of inducement only. *Upton* v. *Curtis*, 5 Moore 201.

IV. EVIDENCE.

1. An avowry, first, by *W.* and *T.* for rent due to them from the plaintiff, as tenant to them; secondly, by *W.* and *T.* and *Anne* his wife, in right of the said *Anne*, for rent due to *W.* and *T.* and *Anne* his wife, in right of the said *Anne*, from the plaintiff, as tenant to *W.* and *T.* and *Anne* his wife, in right of the said *Anne*,—are supported by evidence of an attornment from the plaintiff to *W.* and *T.* and *Anne* his wife: where the avowants proved an attornment made by the plaintiff, after ejectment brought against him seven years before the commencement of the replevin suit, during which period it did not appear that rent had been demanded. *Gravenor* v. *Woodhouse*, 1 Bing. 38.

2. A declaration in debt by the assignee of a surety-bond in replevin, set out the condition; which was, that "if *B.* appeared at the then next County Court, and there prosecuted his suit without delay, against *J.*, the bond to be void.—Averment, that *B.* did not appear, &c."—Pleas, first, *non est factum*, and issue thereon; secondly, that "*B.* did appear and prosecute, &c.;" and thirdly, that "*B.* did appear at the then next County Court, and prosecute, &c., and which said suit *is still depending and undetermined.*"—Replication to the second and third pleas, traversing the appearance and prosecuting of the suit, but not traversing the allegation that the suit was *still depending and undetermined*, and issue on the replication:—Held, on these pleadings, that an agreement (which was made a rule of Court) between the plaintiff and the principal to stay all proceedings in the replevin, upon payment by the latter of a certain sum of money, each party to pay his own costs, was admissible in evidence to negative the allegation in the third plea that the suit was *still depending and undetermined;* and that the surety was not discharged by such agreement after breach by the principal, but was liable for such sum as appeared upon a reference to be due. *Hallett* v. *Mountstephen*, 2 Dow. & Ryl. 343.

3. In an action of replevin by an under-tenant against a landlord, who, towards discharging the rent due from his tenant, distrained, as bailiff of his tenant, for the amount of rent due from the under-tenant to the tenant:—Held, that the tenant was not a competent witness to prove the amount of the rent due from the under-tenant. *Upton* v. *Curtis*, 1 Bing. 210.

4. But, where in replevin by *A.* for growing crops, the issue was whether *A.* and *B.* were joint tenants to *C.* of the land on which the distress was made:—Held, that *B.* might be examined as a witness to disprove the joint tenancy, he not being liable to costs;—at all events, he might be examined on the *voire dire* as to his interest in the event of the suit. *Bunter* v. *Warre*, 3 Dow. & Ryl. 106. *S. C.* 1 B. & C. 689.

V. PROCEEDINGS, WHERE STAID OR SET ASIDE.

1. Where an avowant in replevin carried down the issue to trial without adding the *similiter* to the plea in bar,—the Court of C. P. set aside the verdict for irregularity, but without costs. *Griffith* v. *Crockford*, 6 Moore 51.

RESCUE.

1. If *A.*, under a pretence of a purchase, obtains possession of *B.*'s goods with a preconceived design not to pay for them, and absconds to avoid a suit for the value, and the sheriff seizes such goods in execution immediately

after the delivery to *A.*: it seems that *B.* may lawfully rescue them out of the hands of the sheriff even by stratagem; but the validity of the purchase by *A.* is a question for a Jury, as it depends upon whether the vendee had obtained possession of the goods with a preconceived design not to pay for them. *Bristol (Earl)* v. *Wilsmore*, 2 Dow. & Ryl. 755. *S. C.* 1 B. & C. 514.

RIOT.

And see also tit. Hundred. Ante. page 150.

1. Where hustings erected at the expense of the candidates at a contested election, were damaged by a riotous assembly, and were afterwards repaired at their expense:—Held, that no action could be maintained at the suit of the returning officer against the hundred. *Allen* v. *Ayre*, 3 Dow. & Ryl. 96.

RIVERS.

See also tit. Evidence. IX. (*a*) Ante. page 128.

1. An Act of Parliament, authorizing persons to repair and cleanse a navigable river, does not authorize them to make a passage to a new wharf on such river. *Parthericke* v. *Mason*, 2 Chit. 658.

SCIRE FACIAS.

I. where necessary, and how sued out.

See *Buddeley* v. *Shafto*, 8 Taunt. 434. Ante, page 120.

1. A *scire facias* is necessary where an *elegit* has not been awarded within a year and a day after judgment. *Rutland* v. *Newnham*, 2 Chit. 384.

2. Where the defendant had suffered judgment by default in an action of debt on bond conditioned for the performance of covenants and payment of costs in *Chancery*, and afterwards filed a bill for an injunction:—Held, that although the plaintiff delayed executing a writ of inquiry more than a year after interlocutory judgment was signed, still that it was not necessary to revive such judgment by *scire facias* before execution, as the defendant attempted to delay it by filing the bill for an injunction. *Powis* v. *Powis*, 6 Moore 517.

II. on recognizances against bail.

1. In order to fix bail, the *capias ad satisfaciendum* must be left four days in the public book in the sheriff's office, and not in the secret book. *Hutton* v. *Reuben*, 2 Chit. 102. *S. C.* 3 M. & S. 323.

2. And a second writ of *scire facias* against bail, not having lain in the sheriff's office four whole days, *exclusive* of the day on which it was lodged, the return day, and an intervening *Sunday*:—was held to be irregular. *Dicas* v. *Perry*, 2 Dow. & Ryl. 869.

3. Where the principal became bankrupt, and on the same day that he obtained his certificate, but before the rising of the Court, the bail were fixed on a *scire facias*:—Held, that the bail

had, till the rising of the Court on that day, before they could be properly fixed; and on payment of costs, the Court ordered an *exoneretur* to be entered on the bail piece. *Johnson* v. *Linsey*,
2 Dow. & Ryl. 385.
S. C. 1 B. & C. 247.

III. PLEADINGS IN.

1. Though the original action was for damages, it is not demurrable in a replication in *scire facias* against bail, to pray judgment of *debt and damages*. *Roe* v. *Roe*, 2 Chit. 322.

2. Where a writ of *scire facias* had been issued irregularly, to which an appearance was entered; and the plaintiff having delivered a declaration, to which a plea was filed pending a motion to set aside the writ:—Held, that the defendant's plea was a waiver of the irregularity. *Sloman* v. *Gregory*,
1 Dow. & Ryl. 181.

SEQUESTRATION.—See EXECUTION. IV. Ante, page 132.

SESSIONS.

I. JURISDICTION OF.

See also Ante. tits. { COUNTY RATE, page 91. MANDAMUS.*passim.* page 182. }

1. The Court will not interfere with the practice of the Court of Quarter Sessions, unless it appears to be manifestly wrong or unjust. *Rex* v. *Essex (Justices,)* 2 Chit. 385.

II. ORDERS OF, WHEN QUASHED.

See also tits. { COUNTY RATE, Ante. page 91. HIGHWAYS. II. Ante. page 148. POOR. IV. (*b*) 2. Ante. page 208. }

1. Where the Quarter Sessions, on an appeal, without hearing the merits, quashed a conviction of the defendant under the statute 39 & 40 *Geo.* 3, c. 106, s. 4, for a defect in form, subject to the opinion of the Court of *King's Bench* upon the point of form:—Held, on the removal of the order by *certiorari*, that the order quashing the conviction might be quashed, and the appeal sent down to be tried on the merits; although there was nothing on the face of the proceedings to shew that the conviction was quashed for form, or that the Sessions desired the opinion of the Court upon the point. *Rex* v. *Ridgway*, 1 Dow. & Ryl. 132.
S. C. 5 B. & A. 527.

III. SPECIAL CASES, HOW STATED.

1. Where one question alone is submitted to the Court of *King's Bench* by the Sessions, that Court will not consider any other questions. *Rex* v. *Guildford*, 2 Chit. 384.

IV. APPEAL TO, WHEN AND HOW MADE.

See also tits. { INCLOSURE ACTS. Ante. page 151. POOR. I. (*b*) Ante. page 202. —— II. (*c*) Ante. page 203. —— IV. (*b*) Ante. page 208. }

1. The statute 12 *Geo.* 2, c. 28, s. 5, against deceitful gaming, requires reasonable notice of appeal to the Sessions against a conviction; but such notice may be by parol, or in writing; and its reasonableness as to time is for the Justices at Sessions to determine. *Rex* v. *Surrey (Justices,)*
1 Dow. & Ryl. 160.
S. C. 5 B. & A. 539.

2. The statute 18 *Geo.* 3, c. 25, s. 5, gives an appeal to the Sessions against the allowance by two Justices, of constables' accounts, "*in case the overseer or overseers* shall find that the parish or township is aggrieved thereby:"—Held, that the right of appeal cannot be exercised by one overseer without the consent or concurrence of the majority. *Rex* v. *Lancashire (Justices,)* 5 B. & A. 755.

S. C. nomine Rex v. *Manchester (Justices,)* 1 Dow. & Ryl. 454.

3. Where an appellant parish gave notice before *Michaelmas* Sessions that they would enter at these Sessions and respite, and try their appeal with effect at the following Sessions; and in the mean time a negotiation had taken place with the respondents as to the settlement of the pauper, but without any determination:—Held, that it was necessary to give a fresh notice of appeal for the following Sessions, to entitle the appellants to be heard. *Rex* v. *Essex (Justices,)* 2 Chit. 385.

4. By the statute 49 *Geo.* 3, c. 68, s. 5, the notice of appeal in a matter of bastardy must specify *the cause and matter* of such appeal. Where, therefore, a notice given by the reputed father of a bastard child of his intention to appeal against an order of filiation, merely stated that he intended to prosecute an appeal against an order of filiation, whereby he was adjudged to be the father of a female bastard child, born on the body of *E. H.*, and chargeable to the parish of *S.*, pursuing the words of the order, without specifying the particular grounds of appeal:—Held, that the notice of appeal was insufficient. *Rex* v. *Gloucestershire (Justices,)* 2 Dow. & Ryl. 426.

S. C. nomine Rex v. *Oxfordshire (Justices,)* 1 B. & C. 279.

SET-OFF

I. WHERE ALLOWED.

1. Where the bankers of *A.*, for several years before his death, had been in the habit of accommodating him with a loan of 1000*l.* upon the security of his promissory note, which was renewed every three months, and which they discounted and placed its amount to his credit as cash paid in by him, and debited him on the other side with the discount; and *A.*, a short time prior to his death, accepted a bill drawn by *B.* on *A.* for 467*l.*, payable at his bankers; which bill having been paid away by *B.*, was discounted by the bankers for a holder who did not indorse it, and the bankers were the holders when it became due; and on the morning of its becoming due, and before the arrival of the post, the bankers having then in their hands 1421*l.* of *A.*'s money, wrote off the bill to the debit of his account; and the same day's post informed them of *A.*'s death two days before; and they called upon *B.* to pay, who paid them 40*l.* on account of the bill, on a representation from them that 40*l.* would be wanting to make *A.*'s account right; and at this time, the last promissory note for 1000*l.* given by *A.* to the bankers, had fifty-three days to run; but they immediately entered that note, as well as the bill of exchange, to *A.*'s debit, allowing on the other side a rebate of discount for the time the note had to run: the executors of *A.* having, before the fifty-three days expired, sued the bankers for the balance in their hands at the time of his death:—Held, that they might set off against the demand of the executors the 467*l.* written upon the bill of exchange, but not the 1000*l.* on the promissory note. *Rogerson* v. *Ladbroke*, 1 Bing. 93.

II. BY AND AGAINST PARTICULAR PERSONS.

(a) *Factors.*

1. Where the plaintiff, an auctioneer, sued for the price of goods sold by him as such, the defendant may set-off a debt due to him from the principal vendor. *Jarvis* v. *Chapple*, 2 Chit. 387.

(b) *Assignees of Bankrupts.*

1. In an action by the assignees of an assured bankrupt, against an underwriter for a loss which happened after the bankruptcy:—Held, that the latter might set-off a sum due to him for premiums on the balance of accounts between the bankrupt and himself. *Graham* v. *Russell*, 5 M. & S. 498.

2. Where *D.* and another purchased goods of two *London* houses, and shipped them upon speculation to a foreign port in the name of *C.*, and not wishing to appear as principals in the transaction, represented to the *London* houses, and to the consignees abroad, that *C.* was the principal, and that they acted merely as his agents; and after the shipment, the *London* houses made advances to *D.* and his partner, as the agents of *C.*, on account of the goods, the proceeds of which remained in the hands of the consignees abroad; and *C.* also advanced money to *D.* and his partner, who afterwards became bankrupts, and at the date of the commission were indebted to *C.* for such advances:—Held, in an action by the assignees for money had and received, that *C.* had a right to retain the proceeds of the goods as a set-off for money advanced to the bankrupts, it being a case of mutual credit within the statute 5 *Geo.* 2, c. 30, s. 28. *Easum* v. *Cato*, 1 Dow. & Ryl. 530. *S. C.* 5 B. & A. 861.

3. A guarantie is merely a contract to indemnify upon a contingency, and being in the nature of a claim for unliquidated damages, cannot form the subject of a mutual credit under 5 *Geo.* 2, c. 30, s. 28. *Sampson* v. *Burton*, 4 Moore 515.

III. COSTS AND JUDGMENTS, WHERE SET-OFF.

See *Gobed* v. *Birt*, 2 Chit. 394. Ante. page 84.

1. *A.* brought an action of use and occupation against *B.* and recovered a verdict; and *B.* afterwards commenced an action of trespass against *A.* for seizing his cattle for rent due, and *A.* suffered judgment by default; and on a writ of inquiry *B.* received 1*l.* more in damages than *A.* had obtained in his action:—Held, that the costs of the one might be set off against the other, although it appeared that *A.* was insolvent, and that his attorney would be thereby deprived of his security for costs. *Lomas* v. *Mellor*, 5 Moore 95.

IV. PLEADINGS AND EVIDENCE.

1. Where a declaration in *assumpsit* stated that in consideration that the plaintiff, for the accommodation, and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate the same for his own benefit; the defendant undertook to provide money for the payment of the bills as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof;—and assigned for breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof, the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses:—Held, on demurrer, that as the plaintiff might be entitled on this declaration to recover special damage, a set-off was not a good plea. *Hardcastle* v. *Netherwood*, 5 B. & A. 93.

2. Where damages are unliquidated and there is no mutuality, there cannot be a set-off:—therefore, where the plaintiff declared in covenant for a total loss on a policy of assurance effected in his own name, and averred the interest in one count to be in himself, and in another in himself and others; to which the defendant pleaded that a less sum was due on the policy than for a total loss, and set-off monies due to them on the plaintiff's bond, which was made to them before they had notice that any other than the plaintiff was interested in the policy:—Held, that these pleas were ill. *Grant* v. *Royal Exchange Assurance (Company,)* 5 M. & S. 439.

3. In an action of covenant for not indemnifying a person against taxes, no plea of set-off can be sustained. *Cooper* v. *Robinson*, 2 Chit. 161.

4. In an action of covenant the defendant should plead a set-off, and having pleaded *non est factum*, and given notice of set-off, he cannot avail himself of it. *Oldershaw* v. *Thompson*, 2 Chit. 388.

5. A plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Laycock* v. *Tufnell*, 2 Chit. 531. S. P. *Sapsford* v. *Fletcher*, 5 T. R. 512.

6. The taking a debtor in execution on a judgment, may be replied to a plea of set-off on such judgment. *Taylor* v. *Waters*, 2 Chit. 303.

7. On a plea of *non assumpsit*, and notice of set-off given to an action for goods sold and delivered, a witness was called to prove a conversation with the plaintiff, in which the latter proposed to refer the matters in dispute between him and the defendant to the arbitration of the witness; but this being refused, the plaintiff admitted that he had received on account of the defendant 800*l*., which sum was more than sufficient to cover the demand in the action:—Held, that this conversation was admissible in evidence under the notice of set-off, and ought not to have been rejected as an offer of compromise; although the plaintiff expressly requested the witness to state the conversation to the defendant, to induce him to come to a compromise. *Thomson* v. *Austen*, 2 Dow. & Ryl. 358.

V. NOTICE, EFFECT OF.

1. Where, in an action by the assignee of an insolvent debtor, for goods sold and delivered by the insolvent, the defendant relied on a set-off; and in the notice delivered by him, he set out a composition-deed of assignment by a former creditor of the defendant to the insolvent, in which there was a covenant by the latter, guaranteeing to the defendant the payment of a dividend agreed to be paid on that occasion; and the notice also stated as other grounds of set-off, money had and received, and on an account stated; but in the particular of the set-off, the defendant stated the subject matter to be a sum of 34*l*., "the amount of the two several dividends of five shillings in the pound upon a debt of 68*l*. due from *Simon Pain* to the defendant which said dividends are directed to be paid by the said *T. L. Pain*, as in the said notice of set-off particularly mentioned:"—Held, that the particulars of such set-off confined the defendant to proof of the demand under the covenant in the deed of assignment, as the sole ground of his defence; and precluded him from giving evidence of satisfaction of the demand of *Pain*, either by money had and received, or on an account stated, according to the terms of the notice of set-off, or by any other means. *Andrews* v. *Bond*, 8 Price 213.

Quære—Whether a notice of set-off was necessary in such a case. 8 Price 213.

SEWERS.

See *Anonymous*, 2 Chit. 137. Ante. page 74.

1. Where the owner of marsh lands was bound by the custom of a sewage-level to repair the sea walls abutting on his own land, and by an extraordinary flood-tide the wall was damaged;—the Court refused to grant a *mandamus* to the Commissioners of Sewers to reimburse him the expense of the repairs; it appearing by affidavit that the wall had been previously presented for being in bad repair, and was out of repair at the time the accident happened: nor can the other land-owners in the level be called upon to contribute to the repairs of such wall. *Rex* v. *Essex (Commissioners of Sewers,)* 2 Dow. & Ryl. 700. S. C. 1 B. & C. 477.

2. A decree by the Commissioners of Sewers, is not conclusive against the party assessed for the payment of a rate, and who resides within the district over which they have jurisdiction; but such party may prove in an action of trespass brought by him against one of the collectors of the rates, for taking his goods to satisfy such rate, that he derived no benefit from the sewer in respect of which the assessment was made: and such evidence having been rejected at *Nisi Prius*, the Court of C. P. granted a new trial. *Stafford* v. *Hamston*, 5 Moore 608.

3. Where bricklayers, employed by the Commissioners of Sewers to repair a public sewer, performed the work in

such a manner as to occasion a damage to a neighbouring house:—Held, that they were liable to an action; although the work itself appeared to be performed in a skilful manner. *Jones* v. *Bird*, 1 Dow. & Ryl. 497. *S. C.* 5 B. & A. 837.

4. A local act of Parliament, enacting that for the better and more effectual execution of the act, all the lands, &c. within a certain district (previously within the jurisdiction of the General Commissioners of Sewers,) and the works, drains, sewers, &c. thereof, should be subject only to the control, &c. and jurisdiction of local Commissioners thereby appointed, and not to the control, direction, survey, or order of any Commissioners of Sewers; does not discharge the inhabitants of the district from their liability to serve on juries at the Sessions of Sewers, without an express provision: nor will the Court of *Exchequer* discharge the estreats of fines imposed by the Sessions, and levied on such inhabitants for refusing to attend when summoned; and the mode of proceeding by which the question was brought under the consideration of the Court, was by a rule to shew cause why the estreats should not be discharged;—the Commissioners of Sewers having refused to join in framing an issue to enable the parties to try the question at law. *Ex parte Owst*, 9 Price 117.

SHERIFF.

I. PRIVILEGE AND PROTECTION.

See also tit. ESCAPE. Ante. page 122.

1. The statute 4 *Anne*, c. 16, s. 20, does not affect the action on the bail-bond when brought by the sheriff; and therefore he may sue on it in any Court, and is not restricted to that in which the original action is brought. *Yorke* v. *Ogden*, 8 Price 174.

2. Where a sheriff or his deputy neglects to enter a plaint in replevin in the County Court for *damage feasant*, the Court of K. B. will not compel him to do so on motion. *Ex parte Boyle*, 2 Dow. & Ryl. 13.

II. DUTY AND LIABILITY OF.

(*a*) *On Arrests.*

See tit. ESCAPE. Ante. page 122. See also *Collins* v. *Snuggs*, 6 Moore 111. *infra.*

1. Where a sheriff knowingly arrests a person sued by a wrong name, he becomes a trespasser; and, if he has taken a bail-bond, he is liable to an attachment, if bail above be not perfected. *Rex* v. *Middlesex (Sheriff,)* 2 Chit. 357.

(*b*) *On return of Writs.*

See *Anonymous*, 2 Chit. 392. Post. page 242.

1. The Court will not direct a sheriff as to the disposal of property remaining in his hands which has been seized under an execution, towards the payment of a fine imposed on the defendant convicted of a blasphemous libel; but if the sheriff has made an improper return, it may be quashed on motion. *Rex* v. *Carlisle*, 1 Dow. & Ryl. 474.

2. Where a sheriff's officer, on arresting a defendant, took five shillings from him with a promise to pay the remainder of what was usual at a future day, and allowed him to go at large without taking a bail-bond, without the plaintiff's assent; he cannot be surrendered in discharge of his bail; and an attachment having issued against the sheriff for not returning the writ, it cannot be set aside:

nor will the Court of C. P. relieve him by allowing him to put in and justify bail. *Collins* v. *Snuggs*, 6 Moore 111.

3. Where a sheriff returned to a writ of *fieri facias*, that he had money in his hands ready to pay over to the plaintiffs; whereas, it had been paid over, through the misconduct of his officer, to the solicitor of a commission of bankruptcy, issued against the defendant, (the original debtor,) and under which commission one of the plaintiffs was appointed assignee, who knew and did not object to such payment:—Held, that this amounted to an assent on the part of such plaintiff to ratify the payment, and consequently, that the sheriff was not liable to pay over to the plaintiffs the sum which he had stated to have received for them in his return to the writ. *Tomlinson* v. *Shynn*, 4 Moore 505.

4. Where the plaintiff withdrew his execution under a consent from the defendant that there should be a fresh levy if the debt were not paid within a given time; and the defendant's goods having been seized under a subsequent execution, the plaintiff placed his warrant in the hands of the officer under the second execution, the defendant having become bankrupt, and left in the possession of the assignees all the effects remaining, after satisfying the second execution, to the exclusion of the plaintiff;—the Court of C. P. would not compel the sheriff to return the plaintiff's writ till he should have been indemnified by the proper parties. *Burr* v. *Freethy*, 1 Bing. 71.

5. The Court enlarged a rule for time for the sheriff to return the writ, though there was only an affidavit that a commission of bankruptcy had issued, and that the sheriff was fearful the act of bankruptcy was before the levy. *Anonymous*, 2 Chit. 204.

6. Sheriffs, or their under-sheriffs, were ordered in future by the Court of *Exchequer* to return all writs and processes issuing out of the King's Remembrancer's Office. against the King's debtors, within seven days from the return-day; and to be apposed at least four days before the last day of the Term in which they are returnable, and to be examined at least one clear day before such apposal, by the sworn clerk to whose revision such writs and processes shall belong, on pain of being taken into custody for contempt. *Reg. Gen.* H. T. 1 & 2 *Geo.* 4, 9 Price 86.

7. And in that Court, if the rule to return the writ expires in vacation, the sheriff must return it at the expiration of the rule, or an attachment may be moved for on the first day of the next Term, as in the *Common Pleas;* because the office of the *Exchequer* is open during the vacation. *Smith* v. *Blyth*, 9 Price 255.

8. Where a sheriff, having taken possession of goods under a *fieri facias* was served with notice by a person claiming the goods under an assignment not to levy, and threatening an action, and the plaintiff having refused to indemnify him, he applied to that Court for time to make his return, until the right to the goods should be determined between the parties, or an indemnity given; they granted a rule to shew cause, but afterwards discharged it, giving the sheriff ten days to make his return. *Etchells* v. *Lovatt*, 9 Price 54.

9. The Court refused to grant an attachment against a sheriff for not selling goods under a *venditioni exponas*, where he had returned he could not sell for want of buyers. *Anonymous*, 2 Chit. 390.

10. And a sheriff having returned a levy under a writ of *fieri facias*, cannot return to the *venditioni* that he has sold the goods but detains the money for another party, under a prior writ of execution; and the Court of *Exchequer* will quash such a return on motion. *Rowe* v. *Tapp*, 9 Price 317.

11. Where the sheriff returned to a *capias* issued by the plaintiff against the defendant, who was in custody and afterwards escaped, "that he had taken the defendant, whose body remained in the prison of, &c.;"—the Court of C. P. refused to permit him to amend the return by striking it out and making another according to the fact; as it was in point of substance correct. *Ibbotson* v. *Tindal*, 1 Bing. 156.

(c) *Under a sale by Fieri Facias.*

See Execution. III. (*b*) (*c*), Ante. page 131.

See also *Bristol (Earl)* v. *Wilsmore*, 2 Dow. & Ryl. 755. *S. C.* 1 B. & C. 514. Ante. page 233.

1. A writ of *fieri facias* having issued against a debtor at the suit of one creditor, and before it was executed, the

attornies of another creditor obtained a warrant upon another *fieri facias* from the same sheriff, directed to their clerk, and executed it before the prior execution was put in:—Held, that the attornies were liable to the sheriff (who had made a return that he had levied the money under the first writ, and had in fact paid the amount of the debt to the creditor,) to refund the money levied under the second execution, in an action for money had and received to his use. *Sawle* v. *Paynter*, 1 Dow. & Ryl. 307.

2. If a sheriff legally take goods in execution, the proprietor of which afterwards becomes bankrupt, and the sheriff sells at one time, after the bankruptcy, enough to satisfy that execution as well as another, which was delivered to him after the bankruptcy, such sale is void, and the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised a sufficient sum to satisfy the first execution. *Stead* v. *Gascoigne*, 8 Taunt. 527.

3. The vendee of a growing crop of grass, who is in possession of the field, for the purpose of making it into hay, may maintain trespass against a sheriff, if, when cut, the close be entered, and part of the grass carried away by a person who has purchased the grass of a bailiff of the sheriff, who had seized and sold it under a *fieri facias* against the original vendor; where the person actually entering, claims under the sale of the sheriff's bailiff, and carries off the crop by his authority. *Tompkinson* v. *Russell*, 9 Price 287.

(c) *In bringing in the Body.*

See *Blachford* v. *Hawkins*, 1 Bing. 181. Ante. page 47.

1. In general, the demand of a plea is a waiver of the justification of bail; but after the time for putting in and justifying bail had expired, (one of the bail having been rejected,) and time was given to add and justify another without prejudice to the plaintiff in his proceedings, and in the interval he demanded a plea:—Held, that an attachment against the sheriff for not bringing in the body was regular, the added bail not having justified within the time for which indulgence was given:—Held also, that the proceedings as to the attachment, though late, were regular against the new sheriff, notwithstanding the original process was executed by the old one. *Rex* v. *London (Sheriffs,)* 1 Dow. & Ryl. 163.

2. Where the plaintiff sued out an original against the defendant in a wrong name, the *præcipe* being right, and the defendant put in bail in his right name; the Court set aside an attachment obtained against the sheriff for not bringing in the body; but without costs on either side. *Boswell* v. *Atkins*, 2 Chit. 56.

3. But an attachment against the sheriff in such a case cannot be set aside on the ground of delay; unless there have been gross laches on the part of the plaintiff to the prejudice of the sheriff. *Rex* v. *London (Sheriffs,)* 2 Chit. 58.

4. Where the plaintiff assigned certain debts owing him, to a trustee, in trust for a third person, one of which was owing from the defendant, and under which he was arrested; and whilst he was in custody of the sheriff, the plaintiff gave the latter notice that he had assigned the debt due from the defendant to him, and afterwards authorized the sheriff to discharge the defendant out of custody, the debt and costs being satisfied; and the trustee afterwards produced the assignment from the plaintiff to him at the sheriff's office, and ordered the sheriff not to discharge the defendant, but he did so; and on being ruled to return the writ, returned that he took the defendant, and safely kept him in custody until the plaintiff discharged him, whereupon he permitted him to go at large:—Held, that the sheriff could not afterwards be ruled to bring in the body of the defendant, as the plaintiff might have his remedy, if any, by an action for an escape, and that the party to whom the debt was assigned, should have indemnified the sheriff for keeping the defendant in custody, at the time he gave him notice of the assignment. *Hookham* v. *Monckton*, 6 Moore 497.

5. Where the defendant was in custody at the time a *capias* issued against him at the suit of the plaintiff, and afterwards escaped; the Court of C. P. refused to set aside an attachment against the sheriff for not bringing in the body, and to compel the plaintiff to resort to his action against the sheriff, on the ground that the latter, having taken no bail-

bond, ought not to be summarily responsible by attachment. *Ibbotson* v. *Tindal*, 1 Bing. 156.

6. A rule *nisi* was granted for an attachment against the sheriff where the bail was put in by a new attorney, without an order for the attorney being changed. *Anonymous*, 2 Chit. 76.

7. Where an attachment for not bringing in the body was obtained after a summons to attend before a Judge for payment of debt and costs:—Held to be irregular; the plaintiff's attorney not having attended at the time. *Rex* v. *Middlesex (Sheriff,)* 5 B. & A. 746.

8. A rule for an attachment against an under-sheriff for not bringing in the body on the death of the sheriff during his year, under 3 *Geo.* 4, c. 15, s. 8, is not absolute in the first instance. *Anonymous*, 2 Chit. 389.

9. The sheriff is liable to an attachment for not bringing in the body, if the rule for the allowance of bail be not served in time; although the bail justified after opposition of counsel in the presence of the plaintiff's attorney. *Rex* v *Middlesex (Sheriff,)* 2 Chit. 99.

10. Where there were three defendants, two of whom were arrested and bailed, and the plaintiff took an assignment of the bail-bonds; and as to the third, the sheriff returned *non est inventus*,—the Court discharged the rule to bring in the body. *Anonymous*, 2 Chit. 391.

11. Where time was given to the plaintiff to see whether bail were really possessed of the property in respect of which they professed their ability to justify, and on the day appointed for coming up again, the bail being rejected, immediately rendered the defendant:—Held, that the sheriff was liable to an attachment; the notice of render not having been served until after the attachment had issued. *Rex* v. *Middlesex (Sheriff,)* 2 Dow. & Ryl. 225.

III. EVIDENCE IN ACTIONS BY AND AGAINST.

See *Glasier* v. *Eve*, 1 Bing. 209. Ante. page 124.

1. Where an assignment by deed, of a lease of premises taken in execution, was made in the name and executed under the seal of office of the sheriff by his under-sheriff:—Held, that such assignment might be proved without shewing the appointment of the under-sheriff, or that he had power by deed to execute instruments in the name of the sheriff. *Doe d. James* v. *Brawn*, 5 B. & A. 243.

2. In an action against the sheriff for not arresting a defendant, proof of the indorsement of the officer's name on the writ by a clerk in the under-sheriff's office, is sufficient to connect such officer with the sheriff, and shew that the indorsement was made with his authority, without calling the officer himself, or producing the warrant under which he acted. *Francis* v. *Neave*, 6 Moore 120. *S. C.* 3 Brod. & Bing. 126.

3. So in an action of debt against a sheriff, to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody on giving bail:—Held, that the indorsement of the name of the officer on the writ, was sufficient to connect him with the sheriff, without shewing that such indorsement was made with his authority. *Bowden* v. *Waithman*, 5 Moore 183.

And see *Fermor* v. *Phillips*, 5 Moore 184. (*n.*) Ante. page 122.

IV. SETTING ASIDE AND STAYING PROCEEDINGS AGAINST.

1. The plaintiff having agreed, on an application from the defendant and one of his bail, to stay proceedings for a month, on payment of costs up to a certain time, and the costs were paid (the agreement being without any notice to the sheriff), and the action not having been settled at the end of the month, the sheriff was attached;—the Court refused to set aside the attachment on the application of the bail. *Rex* v. *Middlesex (Sheriff,)* 1 Dow. & Ryl. 388.

2. On a question whether a regular attachment against the sheriff should stand as a security, the plaintiff having lost a trial; and it appearing that the cause which was defended might have been set down for the last Sittings in the Term, wher defended causes are not usually tried,—the Court refused to take notice of the latter circumstance, and held, that the plaintiff had lost a trial, and ordered the attachment to stand as a security. *Jaques* v. *Campbell*, 1 Dow. & Ryl. 450.

3. The Court will not stay the proceedings in an action for a false return,

and a *distringas* to make a return, although the plaintiff proceeded by both remedies at the same time. *Anonymous*, 2 Chit. 392.

V. FEES.

For the Fees of Sheriff's Officers see ARREST. VIII. Ante. page 22.

1. The sheriff is not entitled to poundage on an execution upon a judgment of *non pros*. *Anonymous*, 2 Chit. 353.

2. Nor on money seized in the Crown debtor's possession, under an extent against the latter.—Nor on money paid by the sureties of a Crown debtor who has been arrested on Crown process, in order to obtain the release of his person.—And a sheriff has no authority, under an extent, as such sheriff, to collect debts due to the Crown debtor; and if he receive such debts, he cannot make them the ground of a charge for poundage on the amount. *Rex* v. *Villers*, 8 Price 587.

3. And in an action by an assignee of a bankrupt, founded on the statute 29 *Eliz.* c. 4, against a sheriff for extortion, on executing a *levari facias* for a Crown debt issued out of the Court of *Exchequer*:— Held, that that statute applied only to cases between party and party, and that the plaintiff's remedy was under the statute 3 *Geo.* 1, c. 15, which gives the sheriff poundage in cases where the debt is due to the Crown, previously to which he was not entitled to such poundage, except under orders issued by that Court. *Stephens* v. *Rothwell*, 6 Moore 338. *S. C.* 3 Brod. & Bing. 143.

4. It seems that the taking a remuneration by the sheriff for extra expenses incurred in dividing the property of a bankrupt into lots, at his request, in order that it might sell to greater advantage, does not amount to an extortion. 6 Moore 338.

SHIP AND SHIPPING.

N.B.—*Where the property in a ship passes to the assignees of a bankrupt, although the owner continues in possession, and as to the construction of the Register Acts*, see BANKRUPT. V. (*a*) Ante. page 51.

I. REGISTRY, SALE AND TRANSFER OF.

1. A transfer of a ship at sea, to a vendee resident in the port in which she is registered, is invalid, unless copies of the bills of sale are delivered to the Custom-house officers in such port within a reasonable time after the sale. *Richardson* v. *Campbell*, 5 B. & A. 196.

2. So an executory agreement *inter partes* for the sale of the share of a vessel, with a present interest therein, though the purchase-money is to be paid, with interest, at a future time, is void by the statutes 26 *Geo.* 3, c. 60, s. 17, and the 34 *Geo.* 3, c. 68, s. 14, unless it contains a recital of the certificate of the ship's registry. *Biddell* v. *Leeder*, 2 Dow. & Ryl. 499. *S. C.* 1 B. & C. 327.

3. Where the plaintiff assigned his ship to the defendant as a security for the repayment of money; but it appeared on the register to be an absolute assignment, and the defendant sold her, and told the plaintiff that he had received the purchase-money, and would account with him for the balance of the proceeds of the sale:—Held, that the plaintiff was entitled to recover this balance in an action of *assumpsit* on the common money counts; the acknowledgment being sufficient to support such action. *Prouting* v. *Hammond*, 8 Taunt. 688.

II. OWNERS.

(a) *Rights and Liabilities of.*

See Ante. tits. { CHARTERPARTY. page 76. FREIGHT. page 144. LIEN. I. — 178. }

1. The owners of a ship, for whose benefit she is navigated, are bound to the owners of goods shipped and received on board to be carried, for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants, whereby such goods may be damaged, although in the due course of the ship's employment the master makes a charterparty under seal; because the owners are not charged directly upon the contract of charterparty, but upon their general liability as principals in the adventure, and deriving profit from the ship's employment:—Where, therefore, a cargo consisting of oranges, had been materially damaged through the improper conduct of the captain, who was also a part owner of the vessel, and the freighters brought an action on the case against him and his co-part-owners for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charter-party, under seal, with the freighters, by which he engaged to convey the cargo to its port of destination; it not appearing from that instrument that he possessed any other character or interest than that of commander or master. *Leslie* v. *Wilson*, 6 Moore 415. S. C. 3 Brod. & Bing. 171.

2. Where there were two joint owners of a ship, and one, by private agreement, parted with all his interest in his share to the other, to be paid for by bills at different dates, but kept his name on the register, by way of collateral security for the payment of the bills:—Held, that he was liable for repairs done to the ship subsequent to such agreement, although he had never afterwards interfered in the concern or management of the ship. *Dowson* v. *Leake*, 1 Dow. & Ryl. N.P.C. 52.

3. Where a consignee was not ready to receive a cargo consisting of rums, and the owners of the ship being desirous to get her cleared, unloaded the cargo, and incorrectly entered it at the excise; in consequence of which the cargo was seized:—Held, that the shipowners were not liable to the consignees for the non-delivery of the cargo, as the bill of lading did not properly describe the same. *Shirwell* v. *Shaplock*, 2 Chit. 397.

4. An action of *assumpsit* for money had and received, is maintainable by an assured part-owner of a vessel, against an insurance broker, who has received from the underwriters the full amount of the sums subscribed on a total loss, although there are several other persons interested as part-owners, who had given the defendants notice of their interest, where the plaintiff insured on the whole ship generally, through the intervention of his captain, who gave the order for effecting the insurance. *Roberts* v. *Ogilby*, 9 Price 269.

III. MASTERS.

(a) *Powers and Duties of.*

See Ante. tits. { CHARTERPARTY. page 76. DEMURRAGE. page 98. }

1. The master of a ship, which was completely wrecked in a foreign port, has no authority to sell goods on freight, saved from the wreck, unless there is an absolute necessity for such sale; though he acts *bona fide*, and according to the best of his judgment, and where the goods were sold by public auction; such sale is, at all events, not binding on the owner of the goods, where the conduct of the vendee imports knowledge of the weakness of the captain's title to sell. *Freeman* v. *East India (Company,)* 1 Dow. & Ryl. 234. S. C. 5 B. & A. 617.

2. So, where the captain of a ship which was in a sinking state from the effects of tempestuous weather, put into a port, short of his destination, and believing that the expense of repairs would frustrate the owner's adventure, he sold the cargo under the order of a Vice Admiralty Court, but it appeared that he might have forwarded it to its port of destination by another vessel, and repaired his own ship at a great expense:—Held, that he ought either to have done the one or the other; and that he had no authority to sell the cargo; and that, consequently, the shipowners were liable to the owners of the cargo for the non-delivery thereof, although the bill of lading merely stipulated for a conveyance, "the dangers and accidents of the seas and of navigation, of what kind soever excepted." *Cannan* v. *Meaburn*, 1 Bing. 243

SLANDER.

I. ACTION FOR, WHEN MAINTAINABLE.

See LIBEL. Ante. *passim.* page 176.

1. The words "he has defrauded a mealman of a roan horse," are not actionable without special damage. *Richardson* v. *Allen*, 2 Chit. 657.

II. PLEADINGS.

1. A plea of justification for slandering the plaintiff as a Justice of t'e Peace, "of pocketing fines of prisoners whom he had convicted," should state the names of the parties convicted, and of whom the plaintiff had received the fines. *Newman* v. *Bailey*, 2 Chit. 665.

SMUGGLING.

See the Statutes 57 *Geo.* 3, c. 87, 3 *Geo.* 4, c. 110.
See also IMPRESSMENT OF SEAMEN. Ante. page 150.

1. Where several persons were taken into custody after an engagement at sea between a revenue cutter and a vessel suspected to be a smuggler, and of which the prisoners were the crew, were delivered on board a King's ship, and detained for fourteen days on suspicion of murder, but without any warrant, and were afterwards brought up by *habeas corpus* to be discharged; and it appeared from the return that there was cause to suspect them of felony,—the Court refused to discharge them, but directed them to be committed to the custody of the Marshal of the *Marshalsea*, in order that they might be taken before a competent tribunal to be examined touching the matters contained in the return, and to be further dealt with according to law. *Ex parte Krans*, 2 Dow. & Ryl. 411. *S. C.* 1 B. & C. 258.

2. A conviction on the statute 24 *Geo.* 3, c. 47, s. 1, which subjects vessels having foreign spirits on board, to forfeiture, when found *hovering*, &c. within the limits of a port of this kingdom, must shew on the face of it, that the party convicted is a *British* subject, and that the vessel was not proceeding on her voyage, wind and weather permitting, but that she was *hovering* without lawful excuse. *Ex parte Hawkins*, 3 Dow. & Ryl. 209. *S. C.* 2 B. & C. 31.

3. The statute 57 *Geo.* 3, c. 87, s. 5, enacts, that "when any person offending against the same, or any other act relating to the Customs or Excise, shall be arrested, he is to be conveyed before one or more Justices of the Peace *residing near to the port or place into which the smuggling vessel is carried, or near to the place where any such person shall be so taken or arrested:*"—And where two persons were found and apprehended in a smuggling-boat under that statute, whilst afloat in the harbour of *F.*, which was within an exclusive local jurisdiction, and after being taken on shore and detained two days there, were carried on board again and conveyed to another port, where they were convicted by two Justices of that port, which had another jurisdiction;—it seems that such conviction is illegal, as the Justices of the harbour of *F.* had the sole authority to convict. *Ex parte Kite*, 2 Dow. & Ryl. 212. *S. C. nomine Kite & Lane's Case*, 1 B. & C. 101.

SPIRITUOUS LIQUORS.

See *Gaitskill* v. *Greathead*, 1 Dow. & Ryl. 359. Ante. page 67.

1. In an action for the amount of a tavern-bill, the plaintiff is not entitled to recover for any items under twenty shillings for spirits supplied to his guests, such charges being prohibited by the statute 24 *Geo.* 2, c. 40, s. 12. *Burnyeat* v. *Hutchinson*, 5 B. & A. 241.

STAMPS.

I. ON AFFIDAVITS.

1. There must be a distinct and separate stamp for each distinct affidavit, before the same can be used or read. *Atkins* v. *Reynolds*, 2 Chit. 14.

2. But former affidavits on an application which has turned out to be ineffectual may be again referred to without fresh stamps. *De Woolf* v. ——, 2 Chit. 14.

And see *Chitty* v. *Bishop*, 4 Moore 413.

II. ON AGREEMENTS.

See *Wansborough* v. *Dyer*, 2 Chit. 40. Post. next page.

1. A stamp is only necessary where a paper is used as evidence of an agreement directly, and not where it is used incidentally; so it is evidence of an acknowledgment contained in it, although not stamped. *Wheldon* v. *Matthews*, 2 Chit. 399.

2. By the statute 55 *Geo.* 3, c. 184, sched. part 1, orders for the payment of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed, are to be placed on the same footing as bills of exchange:—Therefore, a letter written from *A.* to *B.* requesting him to pay *C. & Co.*, or their order, 600*l.* out of the first proceeds of a stock of gunpowder, then in the hands of *B.*, and to charge the same to the account of *A.*, although followed by a subsequent correspondence between the parties,—was held to require a stamp, as an order for the payment of money within the provisions of that statute, and consequently, that an agreement-stamp affixed on payment of a penalty, was improper. *Butts* v. *Swan*, 4 Moore 484.

3. Where *A.*, by letter, entered into an agreement with *B.*, who became a party to the engagement by writing a memorandum at the bottom of the copy of the letter, and *C.* afterwards became guarantee for *B.* to *A.* by an indorsement on the back of the copy of the same letter, in which reference was made to the terms of the agreement on the other side of such copy:—Held, in an action on the guarantie, that only one stamp was necessary. *Stead* v. *Liddard*, 1 Bing. 196.

4. An agreement between a landlord and tenant for the latter to give up the principal part of a farm to the former, who was to purchase the stock thereon at a valuation; and the tenant was to hold over half the house without paying rent, and deliver up the same at a subsequent day; requires a surrender-stamp under the 55 *Geo.* 3, c. 184, sched. part. 1, as such agreement operates as a surrender of the term:—

Held, therefore, that an agreement-stamp was insufficient. *Williams* v. *Sawyer*, 6 Moore 226.
S. C. 3 Brod. & Bing. 70.

5. If an instrument of demise in writing, of apartments, for a period of three months certain, requires either an agreement or lease stamp, within the provisions of the statute 55 *Geo.* 3, c. 184, it is not necessary that it should be stamped before the rule is granted under the statute 1 *Geo.* 4, c. 87, it being time enough at any time before the trial of the ejectment; and such a tenancy is within the meaning of the latter statute. *Doe d. Phillipps* v. *Roe*,
1 Dow. & Ryl. 433.
S. C. 5 B. & A. 766.

III. ON APPRAISEMENTS.

1. An appraisement does not require an award stamp, although, in fact, it is in the nature of an award. *Perkins* v. *Potts*, 2 Chit. 399.

IV. ON APPRENTICESHIP, INDENTURES OF.

1. An indenture of apprenticeship, executed before the passing of the statute 44 *Geo.* 3, c. 98, must be stamped with the premium-stamp, within the time prescribed by the statute 8 *Anne*, c. 9; and where such an indenture was stamped at the time of its being produced in evidence with the stamp required by the statute 55 *Geo.* 3, c. 184, but not within the time prescribed by the statute of *Anne*:—Held, that the indenture was wholly void. *Rex* v. *Chipping-Norton (Inhab.)*,
5 B. & A. 412.

V. ON ARBITRATION BONDS.

1. An agreement stamp is not necessary to an arbitration bond, containing, besides the usual covenants, an agreement as to the payment of costs. *Wansborough* v. *Dyer*, 2 Chit. 40.

VI. ON BAIL BONDS.

1. To a plea in an action on a bail bond at the suit of the assignee of a sheriff, that the assignment of the bond was not stamped before the exhibiting of the plaintiff's bill in the cause, the plaintiff need merely reply that the assignment was stamped at or before the exhibiting of the bill; and conclude his replication to the country; and he need not take issue as to the time when the bill was exhibited, nor aver that the assignment was stamped "before the commencement of the suit," and if the action thereon be in the *King's Bench*: and if the plaintiff avers that it was stamped at *Westminster*, he may nevertheless conclude to the country. *Carter* v. *Yates*, 2 Chit. 53.

VII. BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill of exchange, altered in the date by the son of the payee at the suggestion of the acceptor, who afterwards accepted it, is unavailable, as it required a new stamp. *Walton* v. *Hastings*,
2 Chit. 121.

And see *Johnson* v. *Garnett*, 2 Chit. 122. Ante. page 63.

2. But an accommodation bill, altered in its date, previously to its being negotiated, with the consent of the parties, does not require a new stamp; and therefore in the hands of a *bona fide* holder for valuable consideration, the acceptor, who had assented to such alteration before the bill became due, cannot avail himself of such an objection, the bill having in fact been altered before it was issued in point of law. *Downes* v. *Richardson*,
1 Dow. & Ryl. 332.
S. C. 5 B. & A. 674.

3. A bill of exchange drawn on the 21st *December*, for 30*l.* payable at two months after date, on a two shilling stamp, and altered on the same day, before acceptance, to the 31st *December*, does not require a half-crown stamp, within the statute 55 *Geo.* 3, c. 184:—The word *date*, as used in that statute, meaning the period of payment expressed on the face of the bill. *Upston* v. *Marshall*,
3 Dow. & Ryl. 198.
S. C. 2 B. & C. 10.

4. By the statute 55 *Geo.* 3, c. 184. sched. part 1, orders for the payment of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed, are to be placed on the same footing as bills of exchange:—Therefore, a letter written from *A.* to *B.*, requesting him to pay *C.* and Co., or their order, 600*l.* out of the first proceeds of a stock of gunpowder then in the hands of *B.*, and to

charge the same to the account of *A.*, although followed by a subsequent correspondence between the parties, was held to require a stamp, as an order for the payment of money within the provisions of that statute, and consequently that an agreement stamp affixed on payment of a penalty, was improper. *Butts* v. *Swan*, 4 Moore 484.

5. In an action by the payee against the drawer of a bill of exchange the declaration stated that the latter drew it "at *St. Helena*, to wit, at *Westminster*," and did not aver a protest either for non-acceptance or non-payment. On the production of the bill, it was dated at *St. Helena*, and not stamped. On an objection that it was inadmissible as an inland bill for want of such stamp, and that the plaintiff had given no evidence of a protest for non-acceptance or non-payment:—Held, that as there was evidence of a subsequent promise by the defendant to pay the amount of the bill, coupled with a letter written by his attorney, offering terms for payment, it was a waiver of those objections, although such attorney swore that such offer was made without prejudice. *Patterson* v. *Becher*, 6 Moore 319.

6. A promissory note for 40*l.* payable to the bearer *generally*, is in law payable on *demand*, and is consequently within the first class of promissory notes in schedule part 1, to the 55 *Geo.* 3, c. 184, which requires a five shilling stamp. *Whitlock* v. *Underwood*, 2 B. & C. 157.

7. A promissory note, reciting that "the defendant had been awarded to pay 500*l.* to the representatives of *J. S.* and that he had paid him 100*l.* in his life-time, and thereby promised to pay his representatives 400*l.* three months after his death, pursuant to an award, first deducting thereout any interest or money *J. S.* might owe to the defendant on any account,"—may be given in evidence in an action brought by the representatives of *J. S.* against the defendant, on an account stated between him and *J. S.*, although it was improperly stamped as a promissory note. *Barlow* v. *Broadhurst*, 4 Moore 471.

8. Two unstamped slips of paper, with "*I. O. U.* 400*l.* and *I. O. U.* 250*l.*" written thereon, are not promissory notes, and may therefore be received in evidence in *assumpsit* for money lent, without being stamped. *Childers* v. *Boulnois*, 1 Dow. & Ryl. N. P. C. 8.

VIII. ON BONDS.

And see Ante. Divs. V. VI.

1. A bond to secure the damages to be recovered upon a new trial, and the costs of the action, in the event of the second trial following the result of the first:—Held, to be properly stamped with a thirty-five shilling stamp. *Lopes* v. *De Tastet*, 8 Taunt. 712.

IX. ON DEEDS.

See tit. DEED. Ante. page 97.

See also *Williams* v. *Sawyer*, 6 Moore 226. *S. C.* 3 Brod. & Bing. 70. Ante. last page.

1. By a deed of assignment, five persons conveyed all their crops, goods, and effects to trustees, in trust to sell, and with the proceeds to be produced by such sale to discharge, first, debts due to the trustees, with interest from the date of the deed; then, debts due to other creditors, with a resulting trust as to the residue to the parties conveying: Held, that such deed did not require an *ad valorem* stamp, as upon a "conveyance" or "mortgage" under the statute 55 *Geo.* 3. c. 184. sched. part 1: as the former clause operates only on actual sales between vendor and vendee; and that it fell within the exception of the latter, viz. "where such conveyance shall be made for the benefit of creditors generally," and therefore that a common deed stamp was sufficient. *Coates* v. *Perry*, 6 Moore 188. *S. C.* 3 Brod. & Bing. 48.

X. ON LEASES.

And see Ante. Div. II.

1. The plaintiff demised a slate pit at *S.* and stone quarries at *M.* to the defendant under an indenture of lease, to hold the one from *Lady-Day* 1815, and the others from *Michaelmas* 1817, for the several terms of fourteen years, from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit, and 130*l.* for the quarries: Held, that all the premises might be demised by one indenture of lease, and that one *ad valorem* stamp on the aggregate amount was sufficient under the 55 *Geo.* 3, c. 184. sched. part 1. tit. *Lease*, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue. *Boase* v. *Jackson*, 6 Moore 480. *S. C.* 3 Brod. & Bing. 185.

2. Where a declaration in *assumpsit*

stated that in consideration that the plaintiff would procure the governors of a charity to grant a lease to the defendant, the latter undertook to pay the plaintiff 170*l.* and it was proved that the governors having originally agreed to grant a lease to the plaintiff, he undertook to assign it to the defendant for the consideration mentioned; but that afterwards a lease, to which the plaintiff was a party and assented, was granted immediately by the governors to the defendant; but the consideration to be paid by the defendant to the plaintiff was not mentioned in that lease:—Held, that such lease was not void on account of this omission, the *ad valorem* duty imposed by the 55 *Geo.* 3, c. 184. applying only to considerations passing between lessor and lessee. *Boone* v. *Mitchell*, 1 B. & C. 18.

XI. ON LEGAL PROCEEDINGS.

And see Ante. Div. I.

1. Before a writ is returnable, it may be altered and re-sealed without a fresh stamp, provided no Term intervene between the *teste* and the day on which it is ultimately made returnable. *Durdon* v. *Hammond*, 2 Dow. & Ryl. 211. *S. C.* 1 B. & C. 111.

2. The statute 48 *Geo.* 3, c. 149 sched. 2., requiring an office copy of the declaration to be written in the usual and accustomed manner, on which a duty of 4*d.* *per* sheet is imposed, and it not having been the practice to write such copies on both sides of the paper:—Held that the service of seventeen office copies of declarations in ejectment so written and delivered to as many tenants in possession, was irregular. *Doe d. Irwin* v. *Roe*, 1 Dow. & Ryl. 562.

3. Declarations and other pleadings in the *Court of Exchequer* must be engrossed on stamped paper, and entered in a book, to be kept in the office of pleas. *Reg. Gen.* H. T. 60 *Geo.* 3. & 1 *Geo.* 4. 8 Price 85.

XII. ON RECEIPTS.

1. An acknowledgment of the correctness of an account, does not require a receipt stamp. *Wellard* v. *Moss*, 1 Bing. 134.

2. Where an action of *assumpsit* was brought for money lent in *France*, and unstamped receipts were produced in proof of the loan; evidence to shew that by the law of *France* such receipts required stamps to render them valid, was rejected, on the ground that the Courts of this country will not notice the revenue laws of foreign states. *James* v. *Catherwood*, 3 Dow. & Ryl. 190.

3. Two unstamped slips of paper, with "*I.O.U.* 400*l.*" and "*I.O.U.* 250*l.*" written thereon, are not receipts, and may therefore be received in evidence in *assumpsit* for money lent, without being stamped. *Childers* v. *Boulnois*, 1 Dow. & Ryl. N.P.C. 8.

STATUTES.

HOW CONSTRUED AND EXPOUNDED.

See Penal Statutes. Ante. page 199, *and the Table of Statutes at the end of this Digest.*

1. The words "*shall and may*" are only imperative, where the clause in a statute is for the public benefit. *Rex* v. *Flockwold Inclosure (Commissioners)*, 2 Chit. 251.

2. Where an Act of Parliament in the enacting clause, creates a power to do certain acts, "except in the places thereinafter mentioned," and the exceptions are only specified in succeeding clauses; the party claiming under a right derived from such power, need not negative such exceptions. *Ward* v. *Bird*, 2 Chit. 582.

3. The 11 *Geo.* 2, c. 19, is a remedial, and not a penal act. *Stanley (Bart.)* v. *Wharton*, 9 Price 301.

4. The 17 *Geo.* 2, c. 38, s. 4, giving an appeal against overseers' accounts to the next general Quarter Sessions after the allowance of the accounts, is a repeal of the 43 *Eliz.* c. 2, s. 6. *Rex* v. *Worcestershire (Justices)*, 5 M. & S. 457.

5. The annual Indemnity Act, 4 *Geo.* 4, c. 1, is prospective, as well as retrospective. *In re Steavenson*, 2 B. & C. 34.

6. *Quære*—Whether money can be considered as personal effects within the meaning of the statute 52 *Geo.* 3, c. 63? *Rex* v. *Mason*, 1 Dow. & Ryl. N. P. C. 22.

STOPPAGE IN TRANSITU.

I. BY WHOM AND WHEN GOODS MAY BE STOPPED IN TRANSITU.

1. The unpaid vendor may stop goods in *transitu* before they come to the hands of the vendee's factor; although such factor has the bill of lading indorsed to order in his possession, and is under an acceptance to the vendee on a general account. *Patten* v. *Thompson*, 5 M. & S. 350.

II. TRANSITUS—WHERE DETERMINED.

1. Where goods were sold, "free on board," and on their shipment, the agent of the vendor tendered a receipt to the mate in the absence of the captain, by which the goods were acknowledged to be shipped on account of the vendor, which the mate kept, but refused to sign, and on the following day signed bills of lading to the order of the vendees:—Held, that the *transitus* was not at an end, but that on the insolvency of the vendees, the vendor was entitled to stop the goods. *Ruck* v. *Hatfield*, 5 B. & A. 632.

2. Where *A.* consigned a quantity of iron to *B.* in barter, and sent it to a carrier to be conveyed, who delivered part of the cargo on the wharf of *B.*, but, before the remainder was delivered, the carrier discovered that *B.* was insolvent, and re-shipped the part delivered, and retained the whole to satisfy his lien for the freight of the cargo, and for a general freight account between him and the consignee:—Held, that the consignor's right of stoppage *in transitu* was not gone; and that he might maintain trover against the carrier for the goods. *Crawshay* v. *Eades*, 2 Dow. & Ryl. 288. *S. C.* 1 B. & C. 181.

TAXES.

I. COMMISSIONERS.

(*a*) *Duties and Liabilities of.*

1. The Commissioners executing the several acts relating to the duties of assessed taxes for districts, are not entitled under the 43 *Geo.* 3, c. 161, s. 15, (empowering them to discharge assessments at their discretion,) to discharge persons charged for houses under the tenth section, on the ground of their not having been occupied during the whole year; unless notice in writing has been given to the assessor, of such houses not having been occupied. *In re Colyton*, 8 Price 117.

2. And if the Commissioners should insert any such allowance in their schedule of discharge, (as in that case the opinion of the Judges cannot be taken, because that can only be done on a case of appeal,) the Court of *Exchequer* will order them to amend their schedule by striking it out. 8 Price 117.

3. And the Commissioners were ordered by that Court to state and sign a case for the appellants, for the opinion of a Judge, where a question arose respecting certain increase of duty made by a surveyor on the appellants. *In re Yarmouth (Commissioners)*, 9 Price 149.

II. ON LAND.

1. Where the tenant of premises under a lease which contained no reservation as to the payment of land-tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards

distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax:—Held, that such acquiescence was equivalent to a dereliction of his claim in the first instance; and that he could not recover back any of the sums so paid by him for land-tax, in an action of *assumpsit* for money paid, on the ground of their being involuntary payments. *Spragg* v. *Hammond*, 4 Moore 431.

2. By an act of the 41 *Geo.* 3, for draining lands in the county of *Lincoln*, it was declared, that "the taxes to be charged and assessed by virtue of the same, should be paid by the tenants of the lands, &c. charged with the same respectively, *who might deduct and retain the same out of the rents payable to their respective landlords.*"—Where, therefore, a tenant had quitted lands liable to a drainage-tax under that act, and, after he had quitted, the collector levied the tax in arrear, upon property which he had left in the possession of the succeeding tenant: Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenants for the time being, and, consequently, that the succeeding tenant might maintain *assumpsit* against the landlord for money paid to his use. *Dawson* v. *Linton*, 1 Dow. & Ryl. 117. *S. C.* 5 B. & A. 521.

III. ASSESSED.

(*a*) *On Houses.*

See also Post. Div. IV. Post-horse duty, Ante. page 208.

1. It seems that houses left unoccupied by the owner during part of the year, where the furniture is not taken away, are liable to the duties for the whole year. *In re Colyton*, 8 Price 117.

2. And the owner of a house, occupied by him till the 26th *June*, is chargeable with the assessed taxes for the remainder of the year; that is, till the succeeding 5th *April*; although he quitted possession on the 26th *June*, and ceased to occupy the house afterwards. *Price's Case*, 8 Price 122. (*n.*)

3. Houses let as lodgings in places of public resort, and which are so occupied by the various families hiring them for the season, (much less than half-a-year at a time), and are, during the remainder of the year, left wholly unoccupied, are chargeable to the assessed taxes for the entire year. *Sollett* and *Glass's Case*, 8 Price 123. (*n.*)

4. And persons letting houses furnished, as lodging-houses, for a part of the year, not being at any time occupied for more than six months successively, and paying three quarters of a year's assessed taxes, are still liable to the charge for the other quarter; and the Commissioners have no power to make any abatement in the assessment, although, during the quarter for which such abatement is claimed, the houses had not been opened. *Skinner's Case*, 8 Price 124. (*n.*)

5. So, a person keeping a house for the purpose of being let as a ready-furnished lodging-house, is chargeable for the whole year's duty, although it be unoccupied and unfurnished for one entire quarter. *Wright's Case*, 8 Price 125. (*n.*)

(*b*) *On Windows.*

1. The lower part of a small house, used as an office, adjoining the dwelling-house of the party, and having an internal communication with the latter, is not exempt from the assessed taxes on windows, as being within the first section of the 57 *Geo.* 3, c. 25, on the ground of its being used as an office, and for no other purpose. *Rex* v. *Dryden*, 8 Price 103.

2. Nor is a room, having no communication with the dwelling-house, if it be part of the house, within the exemption of the statute, as being used only for an office. 8 Price 103.

3. The windows of the upper story of a house, of which the lower part, or ground floor, is occupied by the owner as a dwelling, are chargeable with the duties on houses and windows, although let to a trader as a warehouse, and is not used by him for any purpose of habitation; and although there be no communication between the upper story so let, and the lower part of the house so occupied for habitation. *Cowell's Case*, 8 Price 105. (*n.*)

4. So, the windows of the lower room of a dwelling-house, used as an accompting-room, and having no communication with the dwelling part of such house, are not within the exemp-

tion of the 57 *Geo.* 3, but are liable to the duties. *Lake's Case*, 8 Price 105. (*n.*)

5. And the windows of a shop on the ground-floor of a dwelling-house, having no internal communication with such house, are chargeable with the duty. *Reinhardt's Case*, 8 Price 106. (*n.*)

IV. COLLECTOR OF.

See *Goss* v. *Watlington*, 6 Moore 355. *S. C.* 3 Brod. & Bing. 132. Ante. page 126.

1. The collector of the personal assessed taxes is empowered by the statute 43 *Geo.* 3, c. 99, s. 33, to distrain "the *person* or *persons* so charged, by *his* or *their* goods and chattels, and all such other goods and chattels as they are by that statute authorised to distrain;" and by the thirty-eighth section, the remedies given by the bankrupt laws are extended to the collector, for enforcing the payment of the same taxes. *Shaftesbury (Earl)* v. *Russell*, 1 Dow. & Ryl. 84. *S. C.* 1 B. & C. 666.

TENANTS IN COMMON.—See tit. CANALS. Ante. page 72.

TENDER.

PLEADINGS AND EVIDENCE.

1. Where to a declaration on a bill of exchange for 10*l.* 4*s.* the defendant pleaded *non assumpsit* as to all the said sum except 4*l.* 7*s.* 6*d.*, and as to that a tender, with an averment that the defendant was always ready and willing to pay the same; and the plaintiff replied, that the defendant was not always ready and willing to pay the said sum, &c.; and a demand thereof after the cause of action accrued, and before the tender, and issue was taken thereon; and on its being proved that the defendant had paid 7*l.* on account of the bill, and had tendered 3*l.* 4*s.*, a verdict was found for him:—Held, that the replication to the plea of tender was not supported by proof of a demand of the whole debt due, but could only be supported by proof of the demand of the precise sum tendered. *Rivers* v. *Griffiths*, 1 Dow. & Ryl. 215. *S. C.* 5 B. & A. 630.

2. And where a defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff,—"There, take your demand;" and at the same time delivered a counter-claim upon the plaintiff of 1*l.* 5*s.*, who said,—"You must go to my attorney:"—Held, that this was not sufficient to support a plea of tender to an action brought for 6*l.* 17*s.* 6*d.* *Brady* v. *Jones*, 2 Dow. & Ryl. 305.

TIME, COMPUTATION OF.

1. A distress having been made on the 6th *June*, and the action not commenced till the 6th *December* following:—*Quære*, whether it was brought within six calendar months after the act committed, as required by the eighth section of the statute 24 *Geo.* 2, c. 44.? *Clarke* v. *Davey*, 4 Moore 465.

TITHES.

I. RIGHT TO,—IN WHOM VESTED.

See *Newling* v. *Pearce*, 2 Dow. & Ryl. 607, *S. C.* 1 B. & C. 437, Ante. page 152.

1. The tithes of all extra-parochial lands, belong *jure coronæ* to the king; and the title of the crown is not confined to such extra-parochial lands only, as were forest or parts of forest land. *Attorney-General* v. *Yardley (Lord)*, 8 Price 39.

2. Seed tares are a great or rector's tithe, and pass to the impropriator under a grant of "*decimas garbarum et granorum*," when coupled with evidence of perception. *Dawes* v. *Benn*, 3 Dow. & Ryl. 122. *S. C.* 1 B. & C. 751.

3. Where, therefore, *Queen Elizabeth* granted by letters patent to *A.* and *B.* *omnes decimas nostras garbarum et granorum* in H. and on an issue between the grantees and vicar to try the right to the tithe of seed tares, it was proved that the grantees had always received it, and that the vicar had received all that were considered small tithes, as well as the tithes of tares cut green, and of hay, and that seed tares were claimed and paid as a great or rector's tithe:—Held, that under the grant every thing passed that was before vested in the Crown, and that the grantees stood in the situation of rector; and as no endowment was produced, that the presumed endowment of the vicar must be limited by perception, and as he had never received the tithe of seed tares, he could not establish a right to it, whether it were great or small. 1 B. & C. 751.

4. Where an inclosure act enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, to the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to *distinguish* by their award the several allotments to such impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes:—Held, that the tithes were not *extinguished* until the commissioners made their award. *Ellis* v. *Arnison*, 5 B. & A. 47.

II. EXEMPTION FROM PAYMENT OF.

1. Where *A* purchased an estate free from rectorial tithes, with a right of common annexed thereto, and the common was afterwards inclosed under an inclosure act, and certain land was allotted to him in lieu of his right of common:—Held, that no tithe was payable in respect of the land so allotted. *Steele* v. *Manns*, 5 B. & A. 22.

III. COMPOSITIONS FOR,—WHEN AND HOW DETERMINED.

1. Parol compositions for tithes are merely personal, and cease with the occupation of the tenant: and the composition, paid by the former occupier is *prima facie* evidence of value. *Paynton* v. *Kirkby*, 2 Chit. 405.

IV. MODUS,—EVIDENCE OF.

1. By the statute 7 and 8 *Will.* 3. c. 6, a summary remedy is given before two Justices for the recovery of small tithes, under the value of 40*s.* (increased to 10*l.* by the statute 53 *Geo.* 3, c. 127, s. 4.); and by the seventh section of the former act an appeal is given to the sessions, but it is thereby declared that no proceedings should be removed or superseded by any writ of *certiorari*, "unless the *title* of the tithes should be in question;" and by the eighth section it is enacted that, "if any person complained against for subtracting tithes, should insist, before two Justices, upon any prescription, composition, or *modus decimandi*, agreement, or *title*, in order to free himself from the tithes claimed, and deliver the same in writing to the Justices, subscribed by him, and should give the party complaining, security to the satisfaction of the Justices, to pay all costs and damages, as upon a trial at law to be had for that purpose in any superior court, should be given against him, in case the prescription, &c. should not,

upon such trial, be allowed, and that in such case the Justices should forbear to give any judgment in the matter, and the party complaining should be at liberty to prosecute such person for the subtraction in any Court in which he might have sued before the act.—*Quære:* whether the Justices had jurisdiction to try a *modus decimandi*, under this statute, or whether their power was taken away by the eighth section of the act? At all events, where, after summons and appearance, two Justices made an order under the statute upon a defendant to pay the value of certain small tithes demanded, and upon the trial of an appeal against the order, the defendant *for the first time*, offered evidence of a *modus decimandi*, which was rejected:—Held, that the sessions did right and that if the defendant meant to avail himself of a *modus* as ground of defence, he was bound to submit his evidence to the two Justices in the first instance. *Rex* v. *Jeffery*, 2 Dow. & Ryl. 860. *S. C.* 1 B. & C. 604.

2. Where a layman, lessee of the tithes of certain closes, which the rector let by auction in separate lots every year, proved that he received payment for tithes in a former year:—Held, to be sufficient evidence of title to enable him to recover on the statute 2 & 3 *Edw.* 6, for not setting out tithes. *Ganson* v. *Wells*, 8 Taunt. 542.

V. VERDICT AND DAMAGES.

See *Pedley* v. *Frampton*, 2 Chit. 155. Ante. page 83.

1. Where the jury in an action of debt on the statute 2 & 3 *Edw.* 6. c. 13, which gives treble value for not setting out tithes, found damages which amounted only to the single value:—Held, that the court could not amend the *postea* by entering the verdict for the treble value. *Sandford* v. *Porter*, 2 Chit. 351.

2. But the jury by finding the treble value under the statute 8 & 9 *Will.* 3, c. 11, s. 3, find in effect the single value also; and although they omitted to find costs, the Court of C. P. ordered such an entry to be made on the *postea* as would warrant their allowance, it appearing that the plaintiff was entitled to recover costs. *Bale* v. *Hodgetts*, 1 Bing. 182.

TOLLS AND PORT DUTIES.

I. RIGHTS TO, AND EXEMPTIONS FROM.

(*a*) *On Goods sold in Markets.*

1. To support a claim of toll traverse, a special consideration need not be shewn:—Where, therefore, to an action of trespass for distraining goods brought to the market of *F.* for tolls due in respect thereof, the defendant justified the distress by shewing a prescriptive right as lord of the manor of *F*, of which the town of *F* formed a part, to take a certain reasonable toll for goods brought within the town for the purpose of being there delivered, and in fact delivered; and averred certain special considerations for taking the toll, to which the plaintiff was no party:—Held, after verdict, that the prescriptive right of soil in the manor (the toll being co-eval therewith) was a sufficient general consideration for the toll, as a toll traverse, the plaintiff having bought and delivered goods within the manor; for where a legal commencement of a prescription can be presumed, it is sufficient to support such claim after verdict. *Rickards* v. *Bennett*, 2 Dow. & Ryl. 389. *S. C.* 1 B. & C. 223.

(*b*) *By Highway and Turnpike Acts.*

See the Statutes 3 *Geo.* 4, c. 126. 4 *Geo.* 4, c. 16. c. 95.

1. Where by a local turnpike act, 2 *Geo.* 3, c. 67, a certain toll was imposed on carriages, and not on the horses drawing them, with a provision that no

persons having paid such tolls and producing a ticket should be again liable on the same day,—and by a subsequent local act, 49 *Geo.* 3, c. 28. reciting the former one, the old tolls were repealed, and others imposed in respect of the horses drawing, and not on the carriages; but all the provisions of the former act were to be continued as fully as if they had been re-enacted:—Held, that toll having been paid on horses passing with a carriage, no new toll was demandable on the same horses returning the same day, although drawing a different carriage. *Gray* v. *Shilling*, 4 Moore 371.

2. The exemption in the general turnpike act, 13 *Geo.* 3, c. 84. from payment of toll by a passenger crossing a road, and not going one hundred yards thereon, is confined to carriages, &c. merely *crossing* the road. *Phillips* v. *Harper*, 2 Chit. 412.

3. An act of Parliament exempting carts and waggons, loaded with manure, from toll, exempts them from toll if they are *going empty* to fetch manure. *Harrison* v. *James*, 2 Chit. 547.
But see 52 *Geo.* 3, *c.* 145.

4. Under an exemption from toll, in an act of Parliament for carts carrying compost, &c., or any thing whatever used in the manuring of land; the carriage of *lime* is not exempt. The words, "or any thing whatsoever used in the manuring of land," being considered as only applying to the carriage of ploughs, harrows, and such like instruments. *King* v. *Gough*, 2 Chit. 655.

5. A notice of action under an act of Parliament against a toll-gate keeper, "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of Parliament, intituled, &c." is uncertain and bad. *Freeman* v. *Line*, 2 Chit. 673.

(c) *By Canal Acts.*

Where and in what proportion a Canal Company is rateable to the Poor, See tit. Poor II. (*b*) Ante, Page 203.

1. Where a Canal Act directed, "that no boat navigating thereon, which should not be capable of carrying a greater burthen than twenty *tons*, or which should not have a loading of twenty *tons* on board, should be allowed to pass through any of the locks, unless the owner or navigator of such boat should pay tonnage equal to a boat of twenty *tons*;" and it did not appear that in any part of the Act a boat *per se* was made liable to any toll, but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—Held, that the clause in question was confined to boats carrying *some* loading, and did not attach upon an *empty* boat passing through the locks. *Leeds and Liverpool Canal Navigation Company* v. *Hustler*, 2 Dow. & Ryl. 556.
S. C. 1 B. & C. 424.

This decision overruled the case of *Hollinshead* v. *The Liverpool and Leeds Canal Company*, 2 B. & A. 66.
And see the statute 59 *Geo.* 3, c. 105.

II. Port Duties.

1. A post-office packet, hired by the post-master general, under a contract to carry mails and government despatches to and from *Dover* to *Calais*, entering the harbour of *Dover* on her return voyage, bringing no mail, but having on board despatches for His Majesty's Secretary at War, and also private passengers and their luggage, a carriage, and bullion, for passage and freight; the vessel being the private property of the commander, is a vessel employed in His Majesty's service, and therefore exempt from the payment of the *Dover* harbour dues, payable under the 47 *Geo.* 3, c. 69; the sixth section of which, contains an exemption in favour of vessels belonging to His Majesty, or that may be employed in his service. *Hamilton* v. *Stow*, 1 Dow. & Ryl. 274.
S. C. nomine Hamilton v. *Stow*, 5 B. & A. 649.

2. Under a clause in an Act of Parliament, (14 *Geo.* 3.) exempting ships "from the payment of the same port or toll duties more than once for the same voyage out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandize:" Held, that a vessel having cleared out of port at *Hull*, with a cargo of goods for *Mogadore* on the coast of *Africa*, which she discharged, and there took in another cargo for *London*; discharged the same at *London*, and took in a cargo for *Hull*, with

which she arrived there; constituted two distinct voyages, and did not fall within the exemption. *Kingston-upon-Hull (Dock Company)* v. *Huntington*, 2 Chit. 597.

TRANSPORTATION.

1. Where a prisoner was convicted of perjury at the assizes at *Chester*, and the sentence of transportation was entered on the record as follows: "Wherefore, all and singular the said premises being seen by the said Justices here, and fully understood, it is therefore *ordered* that he the said *L. K.* be transported to the coast of *New South Wales*, or some one or other of the islands adjacent, for and during the term of seven years:" Held, on error brought, that this was no judgment, but merely an order. *Rex* v. *Kenworthy*, 3 Dow. & Ryl. 173. S. C. 1 B. & C. 711.

TRESPASS.

I. BY WHOM, AND IN WHAT CASES MAINTAINABLE.

N. B. Where Trespass on Case is the proper remedy, See ACTION II. (*b*) Ante, Page 3. *As to what Costs are recoverable in Trespass*, see Ante, tit. COSTS, Div. I. (*a*) (*c*) VI. Pages 83. 86.

See also *Blundell* v. *Catherall*, 5 B. & A. 268. Ante. Page 62.
Chamier v. *Llingon*, 2 Chit. 410. Ante. Page 186.

1. Where the plaintiffs, who were employed as contractors for making a navigable canal, had erected a dam composed of piles and earth, with the consent of the owner of the soil, for the purpose of completing their work:—Held, that they might maintain trespass against the defendants as wrong doers, for breaking and destroying the same. *Dyson* v. *Collick*, 1 Dow. & Ryl. 225. S. C. 5 B. & A. 600.

2. The landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass *vi et armis*, against a third person, for carrying it away, after it has been cut down. *Ward* v. *Andrews*, 2 Chit. 636.

3. So, the vendee of a growing crop of grass, who is in possession of the field, for the purpose of making it into hay, may maintain trespass against the sheriff, if, when cut, the close be entered, and part of the grass carried away by a person who has purchased the grass of a bailiff of the sheriff, who had seized and sold it under a *fieri facias* against the original vendor; where the person actually entering, claims under the sale of the sheriff's bailiff, and carries off the crop by his authority. *Tompkinson* v. *Russell*, 9 Price 287.

4. The statute 13 *Geo.* 3, c. 78, s. 60, imposing a penalty on the driver of a cart or waggon for riding thereon under the circumstances therein mentioned, authorises a Justice of the Peace, on his own view, or upon the oath of one witness, to convict the offender; and in case he refuses to discover his name, or

the name of the owner of the cart, &c., he is subjected to a like penalty, and may, without warrant, be apprehended forthwith by the person seeing the offence committed:—Where the driver of a waggon committed an offence within that statute, in the view of a magistrate, and having placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, and the magistrate, in order to ascertain the name, stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership: Held, on demurrer, that this was a trespass, for which the driver h d a right of action. *Jones* v. *Owen*, 2 Dow. & Ryl. 600.

II. WHERE NOT.

1. If in the prosecution of a lawful act, an accident purely accidental arises, no action can be supported for an injury arising therefrom. *Davis* v. *Saunders*, 2 Chit. 639.

2. But it seems otherwise where any blame is imputable, though a person be innocent of any intention to injure; as if he drives a spirited horse improperly, or uses imperfect harness, and the horse takes fright and kills another. *Wakeman* v. *Robinson*, 1 Bing. 213.

3. Trespass is not maintainable against commissioners of a bankrupt for committing a witness to prison for not satisfactorily answering questions put to him whilst under examination before them, touching the estate and effects of a bankrupt, even though the questions may appear to the Court to have been satisfactorily answered. *Doswell* v. *Impey*, 2 Dow. & Ryl. 350. *S. C.* 1 B. & C. 163.

4. It is no offence within the statute 1 *Geo.* 4. c. 56., "wilfully and maliciously to carry away" a post or pale, unless the party charged, has wilfully or maliciously committed the damage, injury, or spoil alleged. *Rex* v. *Harper*, 1 Dow. & Ryl. 222.

5. Where a tenant did not deliver up possession of a house, his term having expired, after a regular notice to quit, and the landlord in his absence broke open the door and got possession, although some few articles of furniture remained therein; and the tenant having obtained a verdict against the landlord in an action of trespass for this entry:—the Court of C. P. granted a new trial, on the ground that the landlord had a right of entry; and consequently, that such action was not maintainable. *Turner* v. *Meymott*, 1 Bing. 158.

6. By the statute 16 and 17 *Car.* 2. c. 12., certain persons were authorized to make navigable the river *Itchin* and certain other rivers, and to cut, dig, and make new channels, and to deepen or widen the rivers, channels, &c. and to do all that might be fit for navigation, and to build locks, &c. upon any of the lands adjoining the rivers, &c. and to make towing paths; and it was expressly provided that the undertakers of the navigation should not make any trench, river, or watercourse, or use the locks, &c. upon the land of any person until a full agreement with, and satisfaction to the owners of the land had been made by the commissioners appointed by the act, or by the persons authorized to make the navigation; nor until satisfaction should be paid to the respective owners of the lands, according to the determination of the commissioners, or by agreement, by the undertakers of the navigation.—By a subsequent clause, the commissioners were to determine what satisfaction any person should have, in respect of any prejudice, loss, or damage sustained for such proportion of his lands next adjoining to the navigation, as should be made use of for the purposes of the Act, in case the undertakers of the navigation should not have agreed beforehand, and satisfied the party so damnified:—Held, that by virtue of the provisions of this Act, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to, and formed out of, the earth excavated from a new channel made for the first time under the Act, as would enable them to maintain trespass. *Hollis* v. *Goldfinch*, 1 B. & C. 205. *S. C.* (not *S. P.*) 2 Dow. & Ryl. 316.

III. PLEADINGS.

(*a*) *Declaration.*

1. In an action of trespass for driving against the plaintiff's cart: it is an immaterial allegation who was riding in it. *Howard* v. *Peete*, 2 Chit. 315.

2. Or to whom the cart belonged at the time of the accident. *Hopper* v. *Reeve*, 1 Moore 407.

(*b*) *Licence.*

1. A tenant from year to year being desirous of letting his house for a quarter, quitted and left it locked, with authority to his landlord to let it during his absence if an opportunity offered, and for that purpose left the key with a neighbour:—An opportunity occurred of letting the house, but the person who had the key having absconded, the landlord entered by placing a ladder against the house and raising the first-floor window, and after shewing the inside of the house, left it in the same state as before:—The house was afterwards entered by persons unknown, and some of the tenant's furniture and wearing apparel were stolen; and the tenant having brought an action of trespass against the landlord for breaking and entering the house, and leaving it insecure, in consequence of which his furniture and wearing apparel were stolen:—Held, that a plea of leave and licence was no answer to the action. *Ancaster* v. *Milling*, 2 Dow. & Ryl. 714.

(*c*) *Molliter manus imposuit.*

1. A music master of a cathedral is not justified in even moderately beating a chorister for singing at a catch-club; though such singing might be injurious to his performing in the cathedral. *Newman* v. *Bennett*, 2 Chit. 195.

(*d*) *Justification.*

1. Where the first count of a declaration stated, that the defendant assaulted and imprisoned the plaintiff; and, during such imprisonment, struck, pulled, and pushed him about, and the defendant justified that he arrested the plaintiff under process; and that the latter, whilst in custody, having conducted himself in a violent manner, the defendant necessarily, and to prevent his escape, struck, &c.:—Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment, and that it was not necessary to new assign the battery by the defendant. *Phillips* v. *Howgate*, 5 B. & A. 220.

2. To trespass *quare clausum fregit*, the defendant justified a right of way over the *locus in quo* in the tenants and *occupiers* of premises adjacent thereto, and it being proved that he was only seised of the premises, in respect of which the right of way was claimed and occupied, by means of a tenant, to whom the premises were demised:—Held, that he was an *occupier* so as to sustain the plea of justification pleaded. *Hollis* v. *Proud*, 2 Dow. & Ryl. 31.

S. C. differently reported, *nomine Proud* v. *Hollis*, 1 B. & C. 8.

3. A plea to an action for breaking the plaintiff's close, that over and across, &c. was a common and public highway for persons to pass along at pleasure, on payment of a certain toll, is not inconsistent or contradictory; particularly if it be not stated to be immemorial, for it may be a highway created by an act of Parliament. *Sutcliffe* v. *Greenwood*, 8 Price 535.

(*e*) *New Assignment.*

See *Phillips* v. *Howgate*, 5 B. & A. 220. *supra.*

1. Where the plaintiff in a declaration of trespass *quare clausum fregit*, began by naming his own close, it is not necessary for him to new assign after a plea of *liberum tenementum* generally, without giving any further description of the close:—Therefore where in trespass for breaking and entering a certain close of the plaintiff's, called the *Fold-yard*, the defendant pleaded that such close was his soil and freehold, and issue was taken thereon, which was found for the plaintiff:—Held, that a new assignment was unnecessary, as the plaintiff was entitled to recover on proving a trespass done in a close in his possession, bearing the name given in the declaration, although the defendant might have a close in the same parish, known by the same name. *Cocker* v. *Crompton*, 2 Dow. & Ryl. 719. *S. C.* 1 B. & C. 489.

IV. EVIDENCE.

See *Morris* v. *Daubigny*, 5 Moore 319. Post. tit. WITNESS.
Hollis v. *Goldfinch*, 2 Dow. & Ryl. 316.
S. C. 1 B. & C. 205, Ante. Page 127.

1. Where the first count of a declaration stated, that the defendant

assaulted and imprisoned the plaintiff; and, during such imprisonment, struck, pulled, and pushed him about; and the defendant pleaded that he arrested the plaintiff under process; and that the latter, whilst in custody, having conducted himself in a violent manner, the defendant necessarily, and to prevent his escape, struck, &c.:—Held, that the second count of the declaration (which omitted the battery) having been justified by proof of the writ, warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses, as laid in the first count. *Phillips* v. *Howgate*, 5 B. & A. 220.

2. Evidence of the practice of one cathedral is not admissible as evidence, where the music-master of another moderately beat a chorister for singing at a catch-club. *Newman* v. *Bennett*, 2 Chit. 195.

3. In an action for an assault, though the defendant has not pleaded a justification, he may extract evidence in mitigation of damages in the cross-examination of the plaintiff's witnesses, and the plaintiff cannot give remote consequences in evidence as special damage. *Moore* v. *Adam*, 2 Chit. 198.

V. STAYING PROCEEDINGS IN.

1. In an action for an assault, the Court required the plaintiff to disclose to the defendants his proper occupation and place of residence, his identity being material to their defence on the trial, and the proceedings were ordered to be staid until such disclosure was made. *Johnson* v. *Birley*, 1 Dow. & Ryl. 174. *S. C.* 5 B. & A. 540.

TRINITY HOUSE.

1. The Trinity House have a right to the duty of ballastage of skreened garden gravel, though not taken from the *Thames*: But it is doubtful, whether gravel taken from the river *Lea* is within the jurisdiction of the Trinity House. *Trinity (Corporation)* v. *Staples*, 2 Chit. 689.

TROVER.

I. BY WHOM AND WHEN MAINTAINABLE.

When Assignees of a Bankrupt may maintain Trover, See BANKRUPT VI. (*a*) 6, 7. Ante, page 53.

1. The unpaid vendor of goods may stop them *in transitu* before they come to the hands of the vendee's factor, although such factor has the bill of lading, indorsed to order, in his custody, and is under an acceptance to the vendee on a general account; therefore, where the vendee became bankrupt and the factor also, and the messenger under the commission of the latter, on the arrival of the ship, went on board and seized the cargo, the agent of the vendor having previously given notice to the captain to deliver the cargo to him, to which he agreed:—Held, that an action of trover would lie by the vendor against the assignee of the bankrupt factor. *Patten* v. *Thompson*, 5 M. & S. 350.

2. Where *A* and *B*, having agreed to purchase cottons on their joint account, directed their brokers to purchase the same, and purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their custody as the brokers of *A*., and immediately after the purchases *B*. paid *A*. one half the value; and after consider-

able purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased; and *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers, as a security for which, the whole of the warrants were deposited with *C.* by the brokers; and while they were so deposited, the latter received directions, both from *A.* and *B.*, to make a division of the goods held on their joint account, which they did, by appropriating specific warrants to each party, and which division was approved of by both; and before the bills became due, the brokers were directed by *A.* to get one half renewed, which *C.* agreed to do, and discounted fresh bills, and the brokers then left in the hands of *C.* as a security for the money thus advanced, the warrants belonging to *B.*; *C.*, however, not then knowing that *B.* had any interest in them:—Held, that the second pledge was the pledge of a specific chattel belonging to *B.* which the brokers had no authority to make, and, consequently, that trover was maintainable. *Barton* v. *Williams*, 5 B. & A. 395.

3. Where the owner of a mill demised it to a tenant for a term, and the latter clandestinely, and without permission of his landlord, dismantled the mill of the machinery, which, on its being removed, was seized by the sheriff under a *fieri facias*, and sold under his authority to a *bona fide* purchaser:—Held, that the landlord might maintain trover against such purchaser, though the tenant's term was unexpired. *Farrant* v. *Thompson*, 2 Dow. & Ryl. 1. *S. C.* 5 B. & A. 826.

4. And if a sheriff legally take goods in execution, the proprietor whereof afterwards becomes a bankrupt, and the sheriff sells at one time, after the bankruptcy, enough to satisfy that, as well as another execution delivered to him after the bankruptcy, such sale is void; and the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution. *Stead* v. *Gascoigne*, 8 Taunt. 527.

5. Where a foreign merchant consigned goods to his correspondent in *London*, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt:—Held, that the factor was liable to the foreign merchant in trover for the goods. *Duclos* v. *Ryland*, 5 Moore 518. *n.*

6. Where a bankrupt was required by his assignees, on his last examination, to deliver to them his books of account, which he did:—Held, that he must be deemed to have delivered them on compulsion; and it being afterwards found that he was not a trader and that the commission had improperly issued, that he might support an action of trover against such assignees, without any previous demand of the books. *Summersett* v. *Jarvis*, 6 Moore 56. *S. C.* 3 Brod. & Bing. 2.

7. Where, in trover for goods, a witness for the plaintiff stated on cross examination, that he had heard the latter say he had been discharged under the Lords' Act after the sale of the goods; and a verdict having been found for him, the Court of C. P. refused to set it aside, although it was objected that the communication made by the plaintiff shewed that he had no title to bring the action. *Summersett* v. *Adamson*, 1 Bing. 78.

8. *Quære*—As to what is a sufficient property in a chattel to maintain trover? *Ward* v. *Bird*, 2 Chit. 582.

II. CONVERSION,—WHAT SHALL BE.

See *Wilson* v. *Girdlestone*, 1 Dow. & Ryl. 488. *S. C.* 5 B. & A. 847. Post. next page.

1. It seems that a sale by one of two tenants in common of the whole of their property, is a conversion as to the share of one. *Barton* v. *Williams*, 5 B. & A. 395.

2. The owner of a ship consigned her to persons abroad, who hypothecated her, and directed the captain to sign a bottomry bond:—on her arrival in *London*, he, by their direction, delivered the register to the defendant (the agent of the consignees), who gave it to their solicitor to institute proceedings in the Court of Admiralty on the bottomry bond:—the ship was sold, by order of that Court, and the register decreed to be given up to the purchaser. The owner became bankrupt, and his assignees brought an action of trover for the register:—Held, that they could not recover, as they might have appeared in the Admiralty Court and prevented the

sale of the vessel, and as the delivery of the register to the purchaser, under the decree of that Court, was not a conversion. *Hossack* v. *Masson*, 4 Moore 361.

3. Where the plaintiff's goods, which had been saved from a fire, were carried to a warehouse by the servants of an insurance company, of which the defendant, as one of such servants, kept the key, and on his being applied to by the plaintiff to deliver them up to him, refused to do so without an order from the company:—Held, that this was not such a refusal as amounted to a conversion. *Alexander* v. *Southey*, 5 B. & A. 247.

4. *A.* brought an action of trespass against *B.* for taking away a filly; *B.* justified the taking as the servant of *C.* The jury found a verdict for *A.* with damages, subject to a reference to *D.*, one of the jurors, to ascertain to whom she belonged; which was to depend on whether a scar should appear on a certain part of her body, and in case it should, the verdict for *A.* was to stand, if not, it was to be entered for *B*:—the filly was delivered to *D.* by the consent of all parties, and he made his award, and found her to belong to *A.*, and accordingly ordered the verdict found for him to stand. *C.*, ten days after the award, demanded the filly of *D.*, who refused to deliver her, and a fortnight afterwards he brought an action of trover for her recovery:—Held, that the detention of the filly by *D.* did not, under the circumstances, amount to a conversion, as *C.* was no party to the original action, and as it did not appear that he was authorised by *B.* to make the demand, to whom alone *D.* was bound to deliver her, he only being liable for the damages awarded to *A.* *Gunton* v. *Nurse*, 5 Moore 259.

III. PLEADINGS AND EVIDENCE.

1. Where in trover for the recovery of title-deeds, a bill was filed against an attorney generally as of *Michaelmas* Term, with a special memorandum that it was filed on the 28th *November*, and it appearing that the demand and refusal were on the 29th, the day after *Michaelmas* Term, parol evidence was admitted to shew that the bill was in fact filed on the 24th *December*, so as to sustain the action, and that a demand and refusal were evidence of a prior conversion. *Wilson* v. *Girdlestone*, 1 Dow. & Ryl. 488. *S. C.* 5 B. & A. 847.

2. And in trover by the assignee of a sheriff against the assignees of a bankrupt for taking goods which the former claimed under an execution issued against the bankrupt's effects before the bankruptcy: — Held, that such assignee must prove the judgment against the bankrupt, as well as the writ of execution, unless it appear from the record or Judge's notes that the defendants were the assignees of the bankrupt. *Glasier* v. *Eve*, 1 Bing. 209.

3. In trover for a deed which the defendant admitted he detained at the request of *J. S.*, and in the detention of which, the latter was actually interested: Held, that the declarations of *J. S.* in favour of the plaintiff's claim, were admissible in evidence; but that he was properly rejected, as being an incompetent witness. *Harrison* v. *Vallance*, 1 Bing. 45.

IV. VERDICT AND DAMAGES.

1. After a plaintiff had recovered damages under a writ of inquiry in trover, for the conversion of his title-deeds, the Court permitted satisfaction of the damages to be entered on the roll, on the terms of the defendant's delivering up the deeds and paying all the costs as between attorney and client, incurred by the plaintiff in the cause, and placing the plaintiff in as good a situation as he stood in before the cause of action accrued. *Coombe* v. *Sansom*, 1 Dow. & Ryl. 201.

TRUSTEES.

See *Mackintosh* v. *Barber*, 1 Bing. 50. Ante. page 133.

See also tits. { DEVISE. II. Ante. page 100.
EJECTMENT. I. Ante. page 113.

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1. Where trustees were authorised to give receipts for the purchase-money of lands directed to be sold, and such money was to be laid out in the pur-

chase of other lands to be settled in the same manner as those sold, a purchaser having paid the purchase-money *bona fide* to the trustees, and having taken their receipt, cannot be affected by any misapplication of the money by them. *Roper* v. *Hallifax*, 8 Taunt. 845.

2. The Ecclesiastical Court has no jurisdiction over a trustee under a testator's will:—Therefore, where a trustee was arrested and committed on a writ *de contumace capiendo* under the statute 53 *Geo.* 3, c. 127, for not exhibiting an inventory and account of the goods of a testator, the Court ordered him to be discharged out of custody. *Rex* v. *Jenkins*, 3 Dow. & Ryl. 41.
S. C. nomine Ex parte Jenkins, 1 B. & C. 655.

3. An Act of Parliament, authorising trustees to improve public streets, and to sell waste lands to defray the expenses of such improvements, and to use the money arising from such sales in such manner as they should think fit, for the carrying the purposes of the act into execution, does not authorise them to expend such money in the opposition of a bill in Parliament, which, if passed, would turn out disadvantageously to the purposes of the former act. *Edwards* v. *Wilson*, 2 Chit. 610.

4. Trustees, appointed by the *Liverpool Dock Act*, are liable to the duty on sales by auction, ordered by them in the execution of the trust. *Rex* v. *Winstanley*, 8 Price 180.

5. Where the City Lottery act (46 *Geo.* 3, c. 97,) vested certain premises in five trustees, and provided, that in case of the death of one or more of them before the drawing of the Lottery, the survivors should fill up the vacancy:—Held, that a conveyance by four only was valid, one having died before the drawing took place. *Doe d. Read* v. *Godwin*, 1 Dow. & Ryl. 259.

TURNPIKE.

See tits. { Highways. Ante. page 148.
Tolls. Ante. page 253.

See also the statutes 3 *Geo.* 4, c. 126. & 4 *Geo.* 4, c. 95.

1. Where any five or more trustees, under a turnpike act, were authorised to make turnpikes, with such suitable out-buildings and conveniencies as they should think necessary on the intended line of road, and the owner of the soil next adjoining a toll-house, (erected in pursuance of the act,) contracted with one of the trustees, on behalf of the rest, to sink a well for the convenience of the toll-house, the expense to be borne by each party equally:—Held, that the sinking the well was within the authority of the trustees; that the contract entered into by one of them on behalf of the rest, was valid; that the action to recover a moiety of the expense of the well was rightly brought in the name of the clerk of the trustees; and that the consent of the trustees through the medium of one, that the well should be sunk, was a good consideration to support the action. *Newman* v. *Fletcher*, 1 Dow. & Ryl. 202.

2. Where two magistrates authorised the surveyor of a turnpike-road which ran through twenty-nine townships, to collect for its repair a composition in lieu of the statute duty, and the surveyor was not examined on oath as to the necessity of the composition, but afterwards made an assessment of sixpence in the pound upon the annual value of the lands of a particular township through which the turnpike-road passed; and the sum to be collected under the assessment was the utmost which the surveyor of the turnpike could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in the township so assessed into complete repair; and the turnpike surveyor returned the assessment to the surveyor of the highways of the township, and directed him to collect the sums therein mentioned, and on a refusal to pay the sum assessed by an inhabitant of the township, two magistrates granted a warrant of distress to levy the same:—Held, that the warrant was bad, the magistrates having no jurisdiction; on the ground, that in order to legalize the

demand under the assessment, it ought to have been previously ascertained how many days statute duty would be required to put the road into complete repair; the composition being demandable only in respect of that number of days' statute duty. *Stanley* v. *Fielden*, 5 B. & A. 425.

3. A defendant having been convicted of forcibly passing a turnpike-gate without paying toll:—Held, that the Sessions, on appeal, properly rejected evidence to shew that the gate had been unlawfully erected; the admissibility of such evidence being a question expressly within the discretion of the Justices at Sessions. *Rex* v. *Cambridgeshire (Justices)*, 1 Dow. & Ryl. 325.

USE AND OCCUPATION.

1. The assignees of a bankrupt having entered into possession of land in the middle of a quarter, which the bankrupt had agreed to take upon a building lease, on the terms of paying the rent half-yearly:—Held, that an action for use and occupation would lie against them for the whole year, though they had not occupied during all the time. *Gibson* v. *Courthope*, 1 Dow. & Ryl. 205.

2. If a tenancy be established by the plaintiff in an action for use and occupation, it is incumbent on the defendant to shew that the tenancy was afterwards determined, or that the landlord has accepted another person as tenant. *Ward* v. *Mason*, 9 Price 291.

3. *A.* took a farm under an agreement from *B.* that *A.* should have the exclusive right of sporting over the manor in which it was situate, and should also occupy certain glebe land within the parish. *A.* entered into possession, but did not sign the agreement; and it appeared that *B.* had no power of conferring the right of sporting, nor could he procure the glebe land.—In an action for the use and occupation of the farm:—Held, that evidence was admissible to shew the annual value of the land without such right, which might be ascertained by the Jury, independently of the amount of the rent reserved by the agreement. *Tomlinson* v. *Day*, 5 Moore 558.

4. *A.* hired apartments by the year of *B.*, who afterwards let the entire house to *C.*, who sued *A.* for the hire of the apartments, in an action for use and occupation:—Held, that *A.* could not impeach *C.*'s title. *Rennie* v. *Robinson*, 1 Bing. 147.

5. In an action of *assumpsit* for use and occupation of lodgings by the defendant's wife, at his request, the defendant cannot plead that she was not his wife, as such plea would amount to the general issue, and also tender an immaterial issue. *Sinclair* v. *Hervey*, 2 Chit. 642.

USURY.

1. The plaintiff and defendant covenanted by deed to become partners in the business of army clothiers for ten years; and that the plaintiff should advance 20,000*l.* as part of the capital for carrying on the business; and that the defendant should provide a like sum; that the plaintiff, during the continuance of the partnership, should receive out of the profits, if they were adequate, or if not, out of the capital, 2000*l.* *per annum* for his share of the profits; that he should not be answerable for any losses or expenses incident to the concern; and that the business should be carried on in the name of the defendant alone. The defendant then covenanted, that on the determination of the partnership by effluxion of time, the sum of 20,000*l.* should be repaid to the plaintiff by instalments, at three months' date, bearing legal interest, to be computed at the determination of the partnership; and if default was made in the annual payment of 2000*l.*, or the joint capital was at any time reduced to 20,000*l.*, then the plaintiff should be at liberty to terminate the partnership, and repay him-

self the 20,000*l*. advanced, immediately; and the defendant was to guarantee all debts, and pay all losses. In an action of covenant brought by the plaintiff to recover the 20,000*l*. at the expiration of the ten years, the defendant pleaded that the deed was executed by way of shift, in pursuance of an usurious contract; which plea, upon issue joined, was negatived by the verdict of the Jury:—Held, that after that finding, the deed must be taken to disclose the real intention of the parties; and that upon the face of it the plaintiff and defendant must be deemed partners; and that it was not void as being a loan of money within the meaning of the statute of usury; and the Court of C. P. refused to grant a new trial, or arrest the judgment. *Enderby* v. *Gilpin*, 5 Moore 571.

This judgment was affirmed in the Court of *King's Bench* in error. 1 Dow. & Ryl. 570. *S. C.* 5 B. & A. 954.

2. Where an Inclosure Act empowered the Commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the Commissioners; and expenses were incurred in the execution of the act before any rate was made, to defray which, the Commissioners drew drafts on their bankers, requiring them to pay the sums therein-mentioned on account of the public drainage, and to place the same to their account as Commissioners; and the bankers, during a period of six years, continued to advance considerable sums by paying these drafts:—Held, that they having from time to time made half-yearly rests in the accounts, and charged interest upon the balance then struck; and the Commissioners having assented to that mode of keeping the accounts, the charging interest half-yearly was not illegal on the ground of usury. *Eaton* v. *Bell*, 5 B. & A. 34.

VARIANCE.

I. IN PROCESS.

1. Where, in a copy of a writ of *latitat* the defendant was described by the name of "*John Stafford*," and in the notice to appear by the name of "*John Stratford*:"—Held, not to be a variance of which the defendant could avail himself on a motion to set aside the service of the process for irregularity. *Wilson* v. *Stafford*, 2 Chit. 355.

II. BETWEEN PLEADINGS AND PROCESS.

See *Large* v. *Attwood*, 1 Dow. & Ryl. 551. Ante. page 48.

1. The Court refused to set aside the proceedings for a variance between the writ and declaration, where two writs had been issued, the one bailable in *assumpsit*, and the other not bailable, but requiring the defendant to answer in a plea of trespass and assault; and one declaration was delivered in *assumpsit*, and the other in trover. *Campbell* v. *Palmer*, 2 Chit. 166.

2. But where the *ac etiam* in a writ was "in a plea of trespass on the case upon promises," and the declaration was delivered in debt, it is a fatal variance; and the Court of C. P. ordered an *exoneretur* to be entered on the bail-piece, and would not allow the declaration to be amended by filing it in *assumpsit*. *Maberley* v. *Benton*, 5 Moore 483.

3. Where a defendant is described in process generally, he may be declared against as administrator; the object of the writ being merely to bring him into Court. *Watson* v. *Pilling*, 6 Moore 66.

4. But where the plaintiffs issued a

writ againt the defendant in their own names, and declared in their own right, and described themselves in the affidavit to hold to bail as surviving partners, it is a fatal variance; and the Court of C. P. ordered the bail-bond to be cancelled, and would not allow the plaintiffs to amend their writ and declaration, on payment of costs. *Attwood* v. *Rattenbury*, 5 Moore 209.

5. Where five defendants were included in an affidavit to hold to bail, and separate bailable process was issued against one, in which the other four were not named; and serviceable process was issued against the other four, who were not mentioned in the bailable process; and the bail-piece named the defendant alone, against whom the bailable process had issued, and the declaration was filed against all five;—that Court refused to enter an *exoneretur* on the bail-piece; although it was insisted that there was a variance between the process and declaration. *Christie* v. *Walker*, 1 Bing. 68.

6. And where an affidavit to hold to bail stated, "that *J. S.* was indebted to the deponent in the sum of 44*l.* 11*s.*" being the amount of a certain inland bill of exchange drawn by the said *J. S.* on the deponent, and by him accepted for the honour of the said *J. S.*, payable to the order of the said *J. S.* at a day now past, and which said bill of exchange was paid by the deponent:"—Held, that although the declaration contained only the money counts for the amount of the bill, it was no variance from such affidavit. *Brooks* v. *Clark*, 2 Dow. & Ryl. 148.

III. BETWEEN PLEADINGS AND EVIDENCE IN PROOF OF CONTRACTS.

(*a*) *In Place.*

1. Where in a declaration of ejectment the premises were described as being in the parish of *Westbury*, and it was proved that there were two parishes of that name, viz. the one *Westbury* on *Trym*, and the other *Westbury* on *Severn*:—Held, that this was no variance. *Doe* d. *James* v. *Harris*, 5 M. & S. 326.

(*b*) *In Circumstances.*

1. Where a declaration in *assumpsit* stated that in consideration that the plaintiff would procure *J. S.* to grant a lease to the defendant, the latter promised to pay the plaintiff 170*l.*, and it was proved that *J. S.* having agreed to grant a lease to the plaintiff, the latter originally undertook to assign it to the defendant for the consideration mentioned; but that afterwards, a lease to which the plaintiff was a party and assented, was granted immediately by *J. S.* to the defendant, in which the consideration to be paid by the latter to the plaintiff was not mentioned:—Held, that the evidence merely amounted to a proof of the substitution of a new contract to procure a lease from *J. S.* to the defendant, in lieu of the original contract; and consequently, that there was no variance. *Boone* v. *Mitchell*, 1 B. & C. 18.

2. But where a declaration stated, that in consideration that the plaintiff would assign to the defendant a bill of exchange, and that he did assign it to the defendant, and a promise by the latter accordingly, and it was proved that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds to the plaintiff; and in pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, for the defendant's own use; and the defendant covenanted to pay the plaintiff a sum equal to any money he should receive on account of the bill:—Held, that as the declaration imported that the plaintiff had made an absolute assignment of the bill, and as the assignment in evidence was conditional only, it was a fatal variance. *Vansandau* v. *Burt*, 5 B. & A. 42.

3. Where in a declaration of *assumpsit* against a carrier it was alleged, "that in consideration that the plaintiff, at the request of the defendant, *had caused* to be shipped on board the defendant's vessel a quantity of wheat, to be carried safely to a certain place for freight, the defendant undertook to carry safely," and the defendant admitted an undertaking to carry antecedently to the delivery:—Held, sufficient to support the allegation, though it appeared that all the wheat was not put on board till the day after such admission. *Streeter* v. *Horlock*, 1 Bing. 34.

4. But where the plaintiffs declared against the defendants on their common law liability as carriers, for the loss of a parcel, stating that they for certain hire

and reward undertook to carry goods from *London* and deliver them safely at *Dover*, and it appeared that the course of dealing between the parties, was for the plaintiffs to pay the defendants an annual sum for the carriage of parcels between *London* and *Dover*, and on the receipt of each parcel, the defendants were in the habit of delivering to the plaintiffs a written acknowledgment, stating that they undertook to deliver the same as directed, *fire and robbery excepted*;" and the Jury found that this contract had been established between the parties, though the loss was occasioned by negligence only: Held a fatal variance. *Latham* v. *Rutley*, 3 Dow. & Ryl. 211. *S. C.* 2 B. & C. 20.

5. A declaration in *assumpsit* stated, that in consideration that the plaintiff, at the request of the defendant, would lend a horse of his to be used by the defendant for a given time, he promised to take proper care of him, and return him to the plaintiff in as good a condition as he was in at the time of the promise, or pay the plaintiff fifteen guineas:—it was proved at the trial that in addition to these terms the contract was that the defendant should find the horse meat for his work: Held, that this was no variance, as the contract was sufficiently stated in the declaration, and as the law would imply that a person who hires a horse is bound to provide him with food during the time of such hiring, unless there be an agreement to the contrary. *Handford* v. *Palmer*, 5 Moore 74.

6. In *assumpsit* on a guarantie, the declaration stated that the defendants undertook to indemnify *A.* for holding goods in his warehouse on their behalf, *and delivering the same up to them when requested so to do.* On the production of the instrument, it appeared that the defendants only guaranteed him for holding the goods in his warehouse on their behalf: Held, that this was no variance, as it must be implied that he was to deliver them up to the defendants. *Sampson* v. *Burton*, 4 Moore 515.

7. It seems that the words "credit" and "usual credit" are synonimous; where, therefore, a declaration described a guarantie as "credit" generally, and in the guarantie the expression was "usual credit:"—Held, that this was no variance. *Atkinson* v. *Carter*, 2 Chit. 403.

8. Where in an action on a bill of exchange it was alleged in the declaration to be "for value received by J. S." and the bill produced was "for value received generally:"—Held to be a fatal variance. *Highmore* v. *Primrose*, 2 Chit. 333. *S. C.* 5 M. & S. 65.

9. Where a declaration upon a promissory note made in *Ireland*, alleged that it was made payable at No. 81, *Dame Street, Dublin*, for sterling money, without averring that *Dublin* was in *Ireland*, and that the money for which the note was given was *Irish* currency:—Held to be insufficient, as the note must be taken to have been drawn in *England* and for *English* money, and was not supported by proof that it was made payable at *Dublin* in *Ireland* and for *Irish* money. *Sproule* v. *Legge*, 2 Dow. & Ryl. 15. *S. C.* 1 B. & C. 16.

10. A declaration in covenant for the assignment of a share in certain *stock*, professed to set out the covenant, and described it as a covenant to assign a certain *sum of* 2000*l.* The defendant, on *oyer*, set out the deed, and demurred as for a variance, that the covenant was to assign *stock*, not *money*:—Held to be no variance; and even if it were, that the defendant should have pleaded *non est factum*, and not have demurred; on the ground, that where a defendant sets out a deed on *oyer* on which the declaration is framed, he cannot on demurrer take advantage of a variance in an immaterial part, between the deed as stated in the declaration, and as set out on *oyer*. *Ross* v. *Parker*, 2 Dow. & Ryl. 662. *S. C.* 1 B. & C. 358.

11. Where a declaration in covenant by the reversioner against *A.*, the assignee of a lease for years (granting licence to *B.* to continue a certain channel open through the bank of a navigable river, upon certain conditions) imported that the grantors had the entire right and absolute possession of the channel, and full power to grant the use of it to *B.*, and it appeared from the indenture that they were described merely as the persons who had the greatest proportion or share in the profits of the navigation, and that they by virtue of all or any powers and authorities vesting in, or enabling them,

granted the licence to *B.*, his executors, administrators, and assigns:—Held, that this was a variance, as the grantors had not the power of granting the privilege which the deed as set out in the declaration purported to grant. *Portmore (Earl)* v. *Bunn*, 3 Dow. & Ryl. 145. *S. C.* 1 B. & C. 694.

12. In covenant for not repairing—if the covenant to repair contains an exception of "casualties by fire," it is fatal on *non est factum* to state it in the declaration as a general covenant to repair, omitting the exception; and the Court of C. P. would not allow the plaintiff to amend on payment of the costs of the trial; but left him to his remedy, by bringing a fresh action. *Brown* v. *Knill*, 5 Moore 164.

13. It is not necessary that an allegation should be as extensive as the proof: Therefore, where a count in debt on the statute 55 *Geo.* 3, c. 137, s. 6. stated that the defendant supplied the poor of the parish of *W.* with provisions, and it was proved that the poor of the parish of *W.* together with the poor of four *other parishes*, were jointly maintained in a *workhouse*:—Held, first, that it was no variance, the proof being larger than the allegation; and secondly, that the objection as to a variance between the allegation of a supply of the poor of the parish of *W.*, and the proof of a supply of other poor in the workhouse, not having been taken at *nisi prius*, could not be afterwards made available. *West* v. *Andrews*, 1 B. & C. 77. *S. C.* not *S. P.* 2 Dow. & Ryl. 184.

14. In an action on the case for negligently pulling down a party wall adjoining a wall of the plaintiff's cellar, whereby the roof of the latter fell in, and a quantity of wine was destroyed; and it appeared that the proximate cause of the damage was by placing a quantity of bricks on the roof of the cellar:—Held, that this was no variance, and need not be set out in the declaration in order to support the action. *King* v. *Williamson*, 1 Dow. & Ryl. N. P. C. 35.

15. Where in a declaration of trover a deed was described as "a certain deed of *assignment*, bearing date, &c. purporting to be made between *T. S.* of the one part and *W. R.* of the other part, and purporting to be a conveyance from *T. S.* to *W. R.* of certain tenements therein mentioned, by *T. S.* to *W. R.* for the remainder of a term therein mentioned, and yet unexpired;" and on its production it appeared to be a *conveyance* of the premises by lease and release between the same parties, and of the same date:—Held to be no variance. *Harrison* v. *Vallance*, 1 Bing. 45.

16. Where in an action for a libel, the declaration alleged, that the defendant had composed, written, and published the libellous matter; and it appeared from the libel itself that he had given references to another work, from which the matter was taken, but which were omitted in the declaration:—Held, that the variance was fatal, inasmuch as the sense of the libel declared upon was different from that produced in evidence, as the omissions altered the sense of the remainder. *Cartwright* v. *Wright*, 1 Dow. & Ryl. 230. *S. C.* 5 B. & A. 615.

17. After verdict in an action for a malicious prosecution for perjury, it is no objection to the description of the Court in which the indictment was found, that the names of the Justices before whom the session of *Oyer* and *Terminer* is held, are not set out; and it seems sufficient to allege that at such a session the defendant maliciously indicted the plaintiff for wilful and corrupt perjury, without describing more particularly the circumstances under which the alleged perjury was supposed to have been committed. *Pippet* v. *Hearn*, 1 Dow. & Ryl. 266. *S. C.* 5 B. & A. 634.

18. Where the condition of a replevin bond was, that the defendant should prosecute his action with effect against the plaintiff, for taking and unjustly detaining the *goods and chattels* of the defendant, in his dwelling-house, farm, lands, and premises, viz. in the house a carpet, &c. *growing crops of corn*, &c.; and should indemnify the sheriff and his officers for replevying the said goods and chattels; and the declaration stated the condition to be, that the defendant should prosecute with effect his action against the plaintiff, for taking and unjustly detaining the defendant's *goods and chattels* in the said condition mentioned, &c.—Held, that this was no variance. *Glover* v. *Coles*, 1 Bing. 6.

19. In an avowry founded on a distress for rent, the defendant averred, that the plaintiff held certain *strata* or

veins of iron-stone, under a lease, which contained a proviso that "if the stone should not be wholly gotten or wrought out within the term of eight years from the commencement of the demise, the rent in respect of such as should then remain ungotten, should be paid to the lessor." On the production of the lease, the proviso contained the additional words, "if the same should be found to be gettable:"—Held, that this was a fatal variance, and that the plaintiff was entitled to recover on *non est factum;* and it seems that he would only be liable to pay for such stone as could be gotten, and not for that which was not gettable. *Adam* v. *Duncalfe,* 5 Moore 475.

IV. BETWEEN PLEADINGS AND RECORD.

1. Where in an action on a contract the surname of one of several plaintiffs was omitted by mistake on the *nisi prius* record, but was inserted in the writ; and the defendant pleaded a tender, and paid money into Court generally on the whole of the declaration, and at the trial attempted to prove a tender, but failed; and the objection as to the omission of the surname having been afterwards taken, the jury found a verdict for the plaintiff, damages one shilling, to be increased to 23*l.* if the Court of C. P. should be of opinion that the omission was not a valid objection: On a motion to increase the damages accordingly that Court refused to interfere. *Longridge* v. *Brewer,* 1 Bing. 113.

2. Where the defendants became sureties in a composition deed, by which the debtors covenanted to pay their creditors by certain instalments, within sixteen months from the date thereof, viz. two shillings in the pound within four calendar months; a like sum within eight calendar months; a like sum within twelve calendar months; and the fourth or last instalment within sixteen calendar months; and on the record it was stated, that the creditors were to receive their four respective instalments on or before the expiration of sixteen *calendar* months from the date thereof, but the instalments were alleged to be payable within four, eight, twelve, and sixteen months generally, omitting the word "calendar:"—Held, that this was no variance, as the deed clearly shewed that the parties meant calendar months. *Cockell* v. *Gray,* 6 Moore 483. *S. C.* 3 Brod. & Bing. 186.

3. Where in case against the sheriff for taking insufficient pledges in a replevin bond, the declaration set out the record, and averred under a *videlicet,* that the plaint in the County Court was levied before *A. B. C.* and *D.* as suitors of the Court, and it appearing from the record that it was levied before *E. F. G.* and *H.*:—Held to be no variance, as it was unnecessary to state or prove the names of the suitors, and that they might be rejected as surplusage. *Draper* v. *Garratt,* 3 Dow. & Ryl. 226. *S. C.* 2 B. & C. 2.

4. Where the record agreed with the declaration, but there was a variance between the record and the issue delivered, the mistake being in the issue, the Court of C. P. refused to set aside the verdict, or grant a new trial. *Jones* v. *Tatham,* 8 Taunt. 634.

V. IN INDICTMENTS.

1. Where a bill of exchange was addressed to, and purported to be accepted by Messrs. "*W.* and *Co.* bankers, *Birchin Lane,*" and in the corner at the foot of the address to them, the figure "3" was written in a small character, but it was not proved to have been on the bill at the time of its being uttered or dishonoured. On an indictment for forgery professing to set out the bill in terms, the figure "3" was inserted as it appeared on the bill when it was produced at the trial. *Quære,* whether this was a variance? *Rex* v. *Watts,* 6 Moore 442.

2. Where an indictment for perjury assigned on evidence given in the Palace Court, described the Court as "the Court of the King's Palace *at Westminster,*" and it appearing from the record of the trial below, that it was called "the Court of the King's Palace *of Westminster:*"—Held, to be no variance. *Rex* v. *Israel,* 3 Dow. & Ryl. 234. And see *Pippet* v. *Hearn,* 1 Dow. & Ryl. 266. *S. C.* 5 B. & A. 634. Ante, last Page.

VENDOR AND PURCHASER.

I. SALE OF GOODS.

(*a*) *Rights and Liabilities of Vendor and Purchaser.*

See *Neale* v. *Reid*, 3 Dow. & Ryl. 158. *S. C.* 1 B. C. 657. Ante. page 26. *Coverley* v. *Burrell*, 5 B. & A. 257. Ante. page 36.

See also Post. tit. WARRANTY.

1. Where a freehold mansion-house was sold at public auction, without any stipulations on the part of the vendor, that the fixtures were to be taken and paid for separately; and the vendee, who had paid the purchase-money, entered into possession under a conveyance:—Held, that the fixtures remaining in the house passed to the vendee by the conveyance of the freehold; and that a demand of, and refusal to deliver *fixtures*, would not entitle the vendor to such articles left in possession of the vendee, as appeared to be moveable goods and chattels. *Colegrave* v. *Dias Santos*, 3 Dow. & Ryl. 255. *S. C.* 2 B. & C. 76.

2. Where the defendant agreed to purchase a lot of trees for a certain sum, and pay for the same according to conditions of sale, and he afterwards felled and carried away part of them without making such payment, and refused to do so until the remainder had been delivered:—Held, that the executors of the vendor having failed to establish a count on the special contract, might recover the value of the trees taken by the defendant, under counts for goods sold and delivered, as the latter by such taking had disaffirmed the entirety of the contract. *Bragg* v. *Cole*, 6 Moore 114.

3. Where the vendor of a horse rescinded the contract for the sale, he is liable to the purchaser for the keep during the time he kept the horse, from the day of the contract. *King* v. *Price*, 2 Chit. 416.

4. Where the defendant entered into a contract for the purchase of wheat, and the bought-note stated that the corn was sold "according to sample, and that it should be paid for in banker's bills, if required;" and the usage of the *Bristol* market was to sell by sample, *subject to the buyer's inspection and approval of the bulk;* and a week after the contract, the defendant applied to see the bulk, but was told by the plaintiff that he would either send for a bushel on the spot, or would send him a load home the next day for his inspection, but that he could not shew him the bulk, as it was in another warehouse, and he did not like to let him into his connexion; and in a few days afterwards the plaintiff sent to the defendant to inform him that the wheat was ready for delivery on producing bankers' bills; but in the mean time the market had fallen, and the defendant repudiated the contract:—Held, that he was not liable in an action for the breach, as he had a right to inspect the whole in bulk at any proper and convenient time after the contract was made. *Lorimer* v. *Smith*, 2 Dow. & Ryl. 23. *S. C.* 1 B. & C. 1.

5. In a contract for the sale of a quantity of tobacco, then on board a vessel bound from *A.* to *B.*, it was stipulated "that one-fifth of the contract price should be paid in ready money on a specified day; and that *for the other four fifths, the sellers were to look to their correspondents abroad, to whom the property was consigned.*" It was, nevertheless, understood between the parties, that interest was to be calculated as if the sale was made at two and three months from final delivery; the buyers to have the benefit of the sellers' policy in case of average. One-fifth of the contract price was paid in ready money:—and on the arrival of the tobacco at *B.*, it met with an unfavourable sale, and a loss of two-fifths of the estimated value took place:—Held, that the buyer was liable to the seller upon this contract, for the amount of such loss. *Hoffman* v. *Heyman*, 2 Dow. & Ryl. 74. *S. C.* 1 B. & C. 7.

6. Where the plaintiff on the sale of a barge by auction under an execution, addressed the company, stating that he had built it for the person against whom the execution was issued, who had not

paid him for it; on which no person bid against him; but the auctioneer refused to knock it down to him at his first bidding, when a friend of his made another bidding, and the plaintiff advanced one shilling more, and paid a deposit in part of the purchase money:—Held, that he did not acquire any property in the barge under such sale. *Fuller* v. *Abrahams*, 6 Moore 316. *S.C.* 3 Brod. & Bing. 116.

(*b*) *Transfer by delivery—when complete.*

As to what shall amount to an acceptance or delivery within the statute of Frauds, see FRAUDS, STATUTE OF, I. (*c*), Ante. page 143.

See also Ante. tit. STOPPAGE IN TRANSITU, page 249.

1. If *A.*, under the pretence of a purchase, obtains possession of *B.*'s goods, and absconds to avoid a suit for their value, and the sheriff seizes such goods in execution immediately after the delivery to *A.*, it seems that *B.* may lawfully rescue them out of the hands of the sheriff even by stratagem, but the validity of the purchase by *A.* is a question for the Jury; *viz.* as to whether the purchaser had obtained possession of the goods with a preconceived design not to pay for them. *Bristol (Earl)* v. *Wilsmore*, 2 Dow. & Ryl. 755. *S. C.* 1 B. & C. 514.

VENUE.

I. WHERE LAID.

1. In debt on the statute 43 *Geo.* 3, c. 84, s. 12, against a vicar for wilfully absenting himself from his benefice, the *venue* must be laid in the county where the offence was committed and the living is situate. *Whitehead* v. *Wynn*, 5 M. & S. 427. *S. C.* 2 Chit. 420.

II. HOW CHANGED OR RETAINED.

1. It is no reason for changing the *venue* in an indictment for a conspiracy in destroying foxes and other noxious animals, that the gentry of the county in which the indictment was found are addicted to fox-hunting. *Rex* v. *King*, 2 Chit. 217.

2. A motion to change the *venue* cannot be made by one of three defendants without the consent of the other two, notwithstanding they had suffered judgment by default, and colluded with the plaintiff, as it was suggested, to withhold their consent. *Anonymous*, 2 Chit. 417.

3. And a defendant cannot move to change the *venue* after an order for time to plead, on the terms of taking short notice of trial for the adjourned *London* sittings after Term. *Nun* v. *Taylor*, 1 Bing. 186.

4. Where the plaintiff declared upon a promissory note, with a count for goods sold and delivered, and laid his *venue* in *London*, and afterwards delivered a particular of demand reversing the order of his demand;—the Court refused to change the *venue* to *Lancashire*, on an affidavit that the real cause of action was for goods sold and delivered, arising in the latter county, and not elsewhere, the existence of the promissory note not being negatived. *Hart* v. *Taylor*, 2 Dow. & Ryl. 164.

5. And the Court refused a rule to change the *venue* in an action on a breach of covenant, though there was a view prayed; because no preponderating circumstances were shewn to make the changing of the *venue* necessary. *Anonymous*, 2 Chit. 419.

6. But the *venue* may be changed in an action for an assault; and the rule was made absolute in the first instance. *Shepherd* v. *Hall*, 2 Chit. 417.

7. And a rule *nisi* was granted to change the *venue* from *London*, to *York*, on an affidavit that four witnesses lived at *Leeds*, and that only one of the facts,

on which the action was brought, occurred in *London*. *Anonymous*, 2 Chit. 418.

8. So a rule *nisi* was granted to change the *venue* from *York* to *London*, the witnesses being *Greenland* fishermen, who would be absent at the time of the *York* assizes. *Atkinson* v. *Sadler*, 2 Chit. 419.

9. In an action directed by the Vice Chancellor to try the validity of a commission of bankrupt, it being sworn by the defendant, and not contradicted by the plaintiff, (the bankrupt) who had laid the *venue* in *Middlesex*, that previously to the issuing of the commission, the plaintiff had resided in *Yorkshire*; that all his dealings had taken place in that county and its vicinity; and that all the defendant's witnesses resided there; and the plaintiff not having disclosed by affidavit that he had any material evidence to give in *Middlesex*, the Court of C. P. allowed the defendant to change the *venue* to *Lancaster* on payment of costs, although the plaintiff offered to give the usual undertaking. *Parker* v. *Eastwood*, 8 Taunt. 635.

10. The issuing of the writ is material evidence in an action for an escape, so as to enable the plaintiff to bring back the *venue* to *Middlesex*, on the usual undertaking; and, therefore, in such an action the *venue* cannot be changed from *Middlesex* to *Northamptonshire* on a rule *nisi*. *Anonymous*, 2 Chit. 418.

VESTRY.

See *Lanchester* v. *Tricker*, 1 Bing. 201. Ante. page 3.

1. Where, by a deed of feoffment, certain lands were granted to fourteen feoffees, for the maintenance of a schoolmaster for a free-school of the parish of *E.*, and the residue for other purposes; provided that no act relative to the lands should be done but in a vestry, or meeting of the feoffees, and ten at least of the inhabitants of the parish, which should be vestrymen, and not feoffees, in a vestry to be held by them; and the masters were to give a bond to three feoffees to resign the appointment upon half-a-year's warning by the feoffees, so that it were with the consent of the feoffees and vestrymen, or the more part of them, which should be assembled in vestry, to be held as aforesaid, so always as at least ten of the vestrymen which were not feoffees should vote at the holding of the vestry:—Held, that in the execution of the power of removal of the schoolmaster, the votes were to be taken *per capita*, and not according to the provisions of the General Vestry Act, 58 *Geo.* 3, c. 59. *Attorney-General* v. *Wilkinson*, 3 Brod. & Bing. 266.

WARDEN OF THE FLEET.

1. A bill may be filed against the Warden of the *Fleet* for an escape on the day after the essoign-day, entitled as of the Term generally; and if the plaintiff give a rule to plead on the first day the Court of C. P. sits, he will comply with the requisition of the statute 8 & 9 *William* 3, c. 27. s. 12, provided he do not sign judgment within eleven days after the filing of the bill. *Bolton* v. *Eyles*, 4 Moore 425.

2. On a motion for an attachment against the Warden of the *Fleet* for not bringing a defendant into Court under a writ of *habeas corpus*; one of his officers swore that the defendant had the benefit of the rules, but that he could not be found until after the time for bringing him into Court had expired, when he was confined within the prison until discharged under an order of the Insolvent Debtors' Court:—the rule for the attachment was ordered to be discharged on the Warden's paying the costs of the application. *Park* v. *Torre*, 6 Moore 260: *S. C.* 3 Brod. & Bing. 93.

3. The clerk of the papers in the

Fleet prison is entitled to a fee of 2*s.* 6*d.* on every action from which a prisoner is discharged; and the Court of C. P. refused to order the Warden to return a sum taken by him for such fees. *In re Rochfort*, 1 Bing. 255.

WARRANT OF ATTORNEY.

I. HOW EXECUTED.

See the statute 3 *Geo.* 4, c. 39.

1. In the Court of *Exchequer*, defeazances must be written on the same paper or parchment as the warrant of attorney itself, and a memorandum of the substance thereof must be made by the person preparing the instrument. *Reg. Gen.* M. T. 43 *Geo.* 3. 8 Price 505.

Same Rule, K. B. 2 E. R. 136.
C. P. 3 B. & P. 310.

II. JUDGMENT ON,—HOW SIGNED AND ENTERED UP.

See AMENDMENT VII. Ante. page 14.

1. No judgment can be signed in the Court of *Exchequer* upon any warrant of attorney not delivered to, or filed with, the Master. *Reg. Gen.* M. T. 43 *Geo.* 3. 8 Price 505.

2. Though by the practice of the Court, judgment cannot be entered up on a warrant of attorney more than one year old without leave of the Court, yet none but the defendant himself can object to any irregularity in this respect. *Jones* v. *Jones*, 1 Dow. & Ryl. 558.

3. And judgment was entered up on an old warrant of attorney, in *Michaelmas* Term, 3 *Geo.* 4., where the affidavit stated that the defendant was alive at *New South Wales* in *August* preceding, as appeared by a letter received from that place, dated as of that month. *Hopley* v. *Thornton*, 2 Dow. & Ryl. 12.

4. The Court allowed judgment to be entered up against husband and wife, on a warrant of attorney given by the latter, *dum sola*. *Hartford* v. *Mattingly*, 2 Chit. 117.

5. Where the defeazance on a warrant of attorney stated that it was given for the payment of a sum *on demand*, and that in case default should be made, judgment was to be entered up, and execution issue:—Held, that an actual demand must be made before the issuing of execution thereon; and that a proposal to the defendant to settle amicably does not amount to such a demand. *Nicholl* v. *Bromley*, 5 Moore 307.

6. Where the plaintiff brought an action upon an annuity deed, and afterwards took a warrant of attorney for the sum due; with a provision, that if within a certain time the annuity was not paid, he should be at liberty to take out execution for the sum specified, together with all costs incurred for or by reason of the non-payment of the annuity:—Held, that he was not at liberty to take out execution for the costs of the action. *Delane* v. *Mott*, 2 Chit. 423.

III. WHEN WAIVED, OR SET ASIDE.

1. A subsequent assignment of goods for the sum secured by a warrant of attorney, is not a waiver of such warrant. *Anonymous*, 2 Chit. 423.

WARRANTY.

1. *Quære*—If a defendant undertakes to invest money on a copyhold security, it amounts to a warranty by him that such security shall be valid and sufficient? *Brown* v. *Howard*, 4 Moore 508.

2. Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that she was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially

copper-fastened:—Held, that notwithstanding the words "with all faults, and without allowance for any defects whatsoever," the vendor was liable for the breach of the warranty. *Shepherd* v. *Kain*, 5 B. & A. 240.

3. A cough, unless proved to be of a temporary nature, is an unsoundness, and a verdict for the defendant was set aside though the horse had, the next day after the warranty, been rode hunting. *Shillitoe* v. *Claridge*, 2 Chit. 425. And see *King* v. *Price*, 2 Chit. 416. Ante. page 268.

4. Proof that a horse is "*a good drawer*" only, will not satisfy a warranty that he is "*a good drawer, and pulls quietly in harness.*" *Coltherd* v. *Puncheon*, 2 Dow. & Ryl. 10.

WASTE.

1. A conservatory erected on a brick foundation, affixed to and communicating with rooms in a dwelling-house, by windows and doors, cannot be removed by a tenant for years, who had erected it during his tenancy; although he had a reversion in fee after the death of his lessor. *Buckland* v. *Butterfield*, 4 Moore 440.

WATER-COURSE.

1. Where the plaintiff brought an action on the case for diverting a water-course, stating, that the *locus in quo* was in the possession of one J. S., as his tenant:—Held, that the averment was satisfied by proof of a mortgage from J. S. the tenant for life, to the plaintiff, who was entitled to the reversion. *Partridge* v. *Bere*, 1 Dow. & Ryl. 272. *S. C.* not *S. P.* 5 B. & A. 604.

WAY.

I. RIGHT OF.

(*a*) *By grant.*

See also tits. { HIGHWAYS. I. Ante. page 148. INCLOSURE ACTS, Ante. page 150. }

1. In an action on the case for the disturbance of a right of way, leading from a public street through the defendant's premises to a yard at the back of the plaintiff's house, originally forming part of the premises demised by lease to the defendant:—Held, that a grant of "all ways, used or enjoyed before with" the plaintiff's premises, was good, though there was no express grant of the way in question. *Kooystra* v. *Lucas*, 1 Dow. & Ryl. 506. S. C. 5 B. & A. 830.

2. Where a lease described premises as abutting on "an intended way of thirty feet wide," which was not then set out, the soil being the property of the lessor; and an under-lease was granted, describing the premises as abutting on "an intended way," not mentioning the *width*:—Held, that the under-lessee was entitled to a *convenient* way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained by such lessee. *Harding* v. *Wilson*, 2 B. & C. 96.

3. And where an under-lease described the road demised and the ways granted, by the words, *all ways thereunto appertaining*, it seems that a right of way over the original lessor's soil would not pass by these words. 2 B. & C. 100.

(*b*) *How pleaded.*

1. Where to an action of trespass *quare clausum fregit*, the defendant in a plea of justification of a right of way over

the *locus in quo*, stated the surrender of a copyhold to him, with all ways then used by the tenants and *occupiers* thereof, and that he was admitted and continued seised, and being so seised, and having occasion to use the way, committed the trespass; and it being proved that he was seised of the premises, in respect of which the right of way was claimed, and *occupied* only by means of a tenant to whom the premises were demised:—Held, that he was an *occupier* to sustain the plea of justification pleaded, as the words of the plea were sufficiently large to comprehend all the purposes for which a person seised might lawfully use the way. *Hollis* v. *Proud*, 2 Dow. & Ryl. 31.
S. C. nomine Proud v. *Hollis*, 1 B. & C. 8.

WILL.

EXECUTION AND REVOCATION OF.

For the mode and requisites of executing a will according to the STATUTE OF FRAUDS, see Ante. page 144.

See also *Mackintosh* v. *Barber*, 1 Bing. 53. Ante. page 133.

1. Where a will, which was written on three sides of one sheet of paper, and duly attested by three witnesses, concluded by stating "that the testator had signed his name to the two first sides thereof, and his hand and seal to the last," and it appeared, that he had put his name and seal to the last only, but had omitted to sign his name to the two first sides:—Held, that the will was well executed, as, whatever might have been the testator's former intention, it was abandoned by the final signature made by him at the time of executing the will. *Winsor* v. *Pratt*, 5 Moore 484.

2. So, where the testator had executed such a will, by which he devised certain real estates to his wife for life, and on her death to J. S. and on the death of both, to his executors in fee, upon certain trusts, and some years afterwards he made various interlineations and obliterations therein, confining the first devise made to his wife to her widowhood, and striking out the devise to J. S. and obliterating the original date, and substituting the day of *November* instead thereof, and the will was never re-signed, re-published, nor re-attested, but a fair copy was afterwards prepared, and the testator added one interlineation therein, not affecting his real estate, but which copy was never signed, published, or attested, and the will thus altered, and fair copy, were found locked in a drawer together, at the residence of the testator after his death:—Held, that there was no revocation of the will as it originally stood, as the alterations and obliterations were merely demonstrative of a future intent of the testator to execute another will which was never carried into effect. 5 Moore 484.

WITNESS.

I. ATTENDANCE OF, AND PROCEEDINGS AGAINST FOR NON-ATTENDANCE.

For the Costs allowable to Witnesses for attending a Trial, see tit. COSTS VIII. Ante. page 88.

1. A notice to produce a letter de-

manding payment of a sum of money served on a witness at eight o'clock in the evening before the trial, is too late. *Atkinson* v. *Carter*, 2 Chit. 403.

2. A witness attending to give evidence in a Court of Justice, who has absconded from his bail, may be re-taken by the bail in Court, and is not protected by his *subpœna*. *Horn* v. *Swinford*, 1 Dow. & Ryl. N. P. C. 20.

3. When an officer of the Court is served with a *subpœna duces tecum*, to produce a judgment-book; if the personal attendance of the officer be necessary, he must be informed of it, or the Court will not grant an attachment against him, his clerk having attended with the book, though the plaintiff was nonsuited in consequence. *Bennett* v. *Jones*, 2 Chit. 403.

4. And the whole expenses of a witness must be paid or tendered to him, where he lives at a distance, in order to ground an attachment against him for not obeying a *subpœna*. *Ashton* v. *Haigh*, 2 Chit. 201.

II. INADMISSIBILITY OF—FROM RELATIVE SITUATIONS.

(*a*) *Attorney or Arbitrator.*

See tit. INSPECTION OF DEEDS, Ante. page 162.

1. In an action against three defendants as partners, the office copy of an answer to a bill in Chancery, filed by one against the others, is admissible in evidence, without producing the original, in order to establish the partnership; and the clerk of their solicitor is a competent witness to prove their identity, though he knows nothing of them but from his intercourse with them professionally in the conduct of the suit in Chancery. *Studdy* v. *Sanders*, 2 Dow. & Ryl. 347.

2. And where, on an issue as to the liability of the defendants as partners, an attorney *subpœnaed* to produce a composition deed, executed between them and another firm, shewing the partnership, may object to the production of the instrument, on the ground that the disclosure of its contents may prejudice the latter, in disputes with other persons. *Harris* v. *Hill*, 1 Dow. & Ryl. N. P. C. 17.

3. Communications made by a party to an attorney are confidential, although they do not relate to a cause existing, or in progress at the time they were made:—Therefore, where an attorney was applied to by a father, to prepare a deed by which his property was to be assigned to his sons, and stated, that there was no consideration for the assignment, on which the attorney refused to prepare it, and it was afterwards drawn by another:—Held, that such attorney was precluded from giving evidence of that fact, in an action brought by the son, in which the validity of the deed was attempted to be disputed, although he was not employed in the cause. *Cromack* v. *Heathcote*, 4 Moore 357.

See also, *Wadsworth* v. *Hamshaw*, 4 Moore 358. n. *S. C.* 2 Brod. & Bing. 5.

4. On *non assumpsit* pleaded, and notice of set off to an action for goods sold and delivered, a witness was called to prove a conversation with the plaintiff, in which the latter began by proposing to refer the matters in dispute between him and the defendant to the arbitration of the witness; but this being refused, the plaintiff proceeded to admit that he had received on account of the defendant 800*l.*, a sum more than covering the demand in the action:—Held, that this conversation was admissible in evidence under the nature of a set off, and ought not to be rejected as an offer of compromise, although the plaintiff expressly requested the witness to state the conversation to the defendant, to induce him to come to such compromise. *Thomson* v. *Austen*, 2 Dow. & Ryl. 358.

III. INCOMPETENCY OF, FROM INFAMY OF CHARACTER, OR PARTIES INJURED IN CRIMINAL PROCEEDINGS.

1. Where a prisoner forged the name of his co-trustee to a power of attorney for selling stock, standing in their joint names, and the forgery being discovered, the stock was not sold:—Held, that such trustee was a competent witness to prove the forgery by the prisoner. *Rex* v. *Wait*, 1 Bing. 121.

2. Where a witness who described himself by a false name at the trial, and was sworn as a Christian when he was in fact a Jew:—Held, that an objection as to his competency should have been taken at the time, and not after verdict; because the oath as taken, subjected the witness to be indicted for perjury if he had sworn falsely. *Sells* v. *Hoare*, 3 Brod. & Bing. 232.

3. *Quære*, Whether a conviction for a conspiracy to commit a fraud by means of false news, disqualifies the party con-

victed from giving evidence in a Court of Justice? *Crowther* v. *Hopwood*, 1 Dow. & Ryl. N. P. C. 5.

IV. INCOMPETENCY FROM INTEREST.

(*a*) *In the event of the Suit.*

1. In an action on the case by a reversioner for an injury done to his inheritance by a stranger, the tenant in possession is competent to prove such injury. *Doddington* v. *Hudson*, 1 Bing. 257.

2. A witness who had voluntarily paid into the hands of the sheriff a sum of money on behalf of a defendant, in lieu of bail, without any inducement from the latter, was rejected on the *voire dire* as being interested. *Lacon* v. *Higgins*, 1 Dow. & Ryl. N. P. C. 46.

3. On an issue directed to try a *modus*, a lessee of the vicar disputing its existence, may be examined on the part of the vicar, if he has previously released the latter. *Robinson* v. *Williamson*, 9 Price 136.

4. In trover for a deed which the defendant admitted he detained at the request of *J. S.*, who was interested in its detention:—Held, that the latter was incompetent as a witness to prove the plaintiff's claims. *Harrison* v. *Vallance*, 1 Bing. 45.

5. In trespass, a person who commits the trespass, but is not sued, is a competent witness for the plaintiff, against his co-trespasser, without being released by the plaintiff. *Morris* v. *Daubigny*, 5 Moore 319.

6. In replevin, by an under-tenant against a landlord, who, in order to satisfy rent due from his tenant, distrained on the under-tenant, and avowed as bailiff of his tenant:—Held, that the latter was not a competent witness to prove the amount of the rent due from the under-tenant to him. *Upton* v. *Curtis*, 1 Bing. 210.

7. But where in replevin by *A.* for taking growing crops, the issue was, whether *A.* and *B.* were joint tenants to *C.* of the land on which the distress was made:—Held, that *B.* might be examined as a witness to disprove the joint tenancy, he not being liable to costs, and that he might at least have been examined on the *voire dire* as to his interest in the event of the suit. *Bunter* v. *Warre*, 3 Dow. & Ryl. 106. *S. C.* 5 B. & C. 689.

8. A person may be convicted under a statute, giving part of the penalty for the offence to the parish where it is committed, on the oath of a witness residing within the parish, provided he pays no rates. *Rex* v. *Cottrell*, 2 Chit. 487.

(*b*) *Bankruptcy—in Questions of.*

1. An assignee of a bankrupt, having released his claim as a creditor on the bankrupt's estate, is a competent witness to support the petitioning creditor's debt, as he merely stands in the situation of trustee to such estate. *Tomlinson* v. *Wilkes*, 5 Moore 172.

2. So in an action by the assignees of a bankrupt who had obtained his certificate and released the surplus of his estate, such bankrupt is a competent witness to prove the signatures of the Commissioners, in order to identify the proceedings taken under his commission. *Morgan* v. *Pryor*, 3 Dow. & Ryl. 215. *S. C.* 2 B. & C. 14.

3. Where an assignee brought an action on the statute 9 *Ann*, c. 14., to recover back money lost by the bankrupt to the defendants at play; and to prove the loss, the bankrupt, who had obtained his certificate, was called as a witness, and in order to render him competent, he released the assignee of all claims upon the surplus fund, if any; and all the creditors who had proved, released the bankrupt from all future claims, and the assignee (who was not a creditor) executed a like release to the bankrupt:—Held, that these three several releases restored the competency of the latter. *Carter* v. *Abbott*, 2 Dow. & Ryl. 575. *S. C.* 1 B. & C. 444.

(*c*) *Partners.*

1. In trover by the assignees of a bankrupt, for goods alleged to have been placed in the hands of the defendants for sale, by the bankrupt, before his bankruptcy, and on his account; and the defendants in order to prove that the goods had been pledged by the bankrupt to C. and Co. for the repayment of money advanced to him thereon, and that the defendants had become legally responsible to them for the money to be produced by the sale. *Quære*, whether a partner in the house of *C.* and *Co.* be admissible as a witness for the defendants, to shew under what circumstances the advances were made by that house to the bankrupt. *Butts* v. *Swan*, 4 Moore 484.

V. EXAMINATION OF.

1. It is an inflexible rule, that a witness who is present in Court during a trial, when he ought not to have been there under an order made for that purpose, cannot be examined as a witness. *Attorney General* v. *Bulpit*. 9 Price 4.

2. A witness, on his examination, may refresh his memory from a document, although not written by himself. *Henry* v. *Lee*, 2 Chit. 124.

3. The Court refused to grant a rule to examine a material witness upon interrogatories on the trial of an action of ejectment; on the ground that he was so ill as to render his attendance impossible. *Anonymous*, 2 Chit. 199.

4. But they will permit interrogatories to be read on the trial of an indictment for perjury, provided the defendant consents to it. *Anonymous*, 2 Chit. 199.

5. And under a commission issued to examine witnesses abroad, it is no objection that a clerk to the plaintiff's attorney is appointed one of the commissioners, and settles the draft of the depositions of one of the plaintiff's witnesses. *Lopes* v. *De Tastet*, 4 Moore 424.

6. Where a witness prevaricated in the course of his examination, and swore both affirmatively and negatively; the Judge refused to stop the cause, but left it to the jury to decide what credit was due to the witness. *Beauchamp* v. *Cash*, 1 Dow. & Ryl. N. P. C. 3.

A

CHRONOLOGICAL TABLE

OF

STATUTES

CITED OR COMMENTED UPON

IN THE

Reports of the Cases

CONTAINED IN THIS DIGEST,

AND ON WHICH ANY POINTS HAVE BEEN DIRECTLY DETERMINED.

N.B.—The STATUTES referred to by Roman Numerals, and the Titles in *Italics*, are either *Local*, *Personal*, or *Private*.

Year of Reign.	Title and Subject.	Reporters. Vol. Page.	This Digest. Title. Page.
HENRY V.			
1 c. 5	Additions - - -	1 Dow. & Ry. 328; S.C. 5 B. & A. 682	Estoppel. 1. - 123
HENRY VI.			
23 c. 9	Sheriff—Fees—Extortion	5 Moore - 330	Amendment. VIII. 2. 14
HENRY VIII.			
23 c. 15	Costs - - - -	8 Price - 212	Costs. II. (*a*) 1. - 85
32 c. 34	Assignee—Grantee—Covenant -	3 Dow. & Ryl. 145; S.C. 1 B. & C. 694	Covenant. I. 5. - 92
EDWARD VI.			
2 & 3 c. 13	Tithes—Setting out -	8 Taunt. - 542	Tithes. IV. 2. - 253
	Tithes—Damages -	2 Chit. - 351	Amendment. VI. 4. 14; Tithes. V. 1. - 253
	Tithes—Costs - -	2 Chit. - 155	Costs. I. (*a*) 1. - 83
5 & 6 c. 16	Offices - - -	6 Moore 31, *n.*; S. C. 2 Chit. 475	Offices. 3. - - 192
ELIZABETH.			
13 c. 5	Fraudulent Conveyance	5 Moore - 19	Fraudulent Conveyance. 1. - - 144
c. 7 s. 11	Bankrupt - - -	1 Dow. & Ryl. 44; S.C. 5 B. & A. 458	Bankrupt. IV. (*a*) 4. 51
18 c. 3	Bastards - - -	2 Dow. & Ryl. 167; S.C. 1 B. & C. 87	Justices of Peace. IV. 2. - 172

Year of Reign.	Title and Subject.	Reporters. Vol. Page.	This Digest. Title.	Page.
ELIZABETH.—(continued.)				
29 c. 4	Sheriff—Poundage -	6 Moore, 338 S.C. 3 Brod&Bing. 143	Sheriff. V. 3. -	242
31 c. 3 s. 1	Outlawry - - -	3 Dow.& Ryl. 55	Outlawry. 2. -	192
c. 5	Penal Action—Venue -	5 M. & S. 427	Penal Action. 2.	199
43 c. 2	Poor Overseers - -	2 Dow.& Ryl. 258 S.C. 1 B.&C. 178	Poor. I. (a) 1. -	201
	Poor—Rate - -	2 Dow.&Ryl. 634 S.C. 1 B.&C. 375	Poor. II. (a) 1.	202
s. 6	Poor—Overseers Accounts	5 M. & S. 457	Statutes. 4. -	248
	Poor—Rate - -	2 Dow.&Ryl. 735 S.C. 1 B.&C. 506	Poor. II. (a) 3.	202
	Poor—Rate - -	2 Dow.&Ryl. 651 S.C. 1 B.&C. 389	Poor. II. (b) 2.	203
c. 6	Costs - - -	9 Price - 314	Costs. I. c. 1. -	84
JAMES I.				
1 c. 15 s. 2	Bankrupt - - -	1 Dow.& Ryl. 111 S.C. 5 B.& A. 516	Bankrupt. I. 1.	49
	Bankrupt - - -	2 Dow.& Ryl. 142 S.C. 1 B.&C. 55	Bankrupt. II. (a) 3.	50
	Bankrupt - - -	5 B.&A. 516. S.C. 1 Dow.&Ryl. 111	Bankrupt. II. (c) 1.	50
s. 17	Bankrupt - - -	1 Dow. & Ryl. 44 S.C. 5 B.& A. 458	Bankrupt. IV. (a) 4.	51
3 c. 8	Bail in Error - -	1 Dow.& Ryl. 184	Error. III. 6. -	121
21 c. 16 s. 1	Limitation of Actions -	6 Moore 542 S.C. 3 Brod&Bing. 217	Limitation of Actions. I. 1. -	179
c. 19 s. 11	Bankrupt - - -	2 Dow.&Ryl. 495 S.C. 1 B.&C. 308	Bankrupt. V. (a) 2.	51
	Bankrupt - - -	4 Moore - 549 S.C. 8 Price 256	Bankrupt. V. (a) 3.	51
	Bankrupt - - -	1 Dow.&Ryl. 587 S.C. 5 B.& A. 942	Bankrupt. V. (a) 4. VI. (b) 9.	52 54
	Bankrupt - - -	2 Dow.& Ryl. 848 S.C. 1 B.&C. 588	Bankrupt. V. (a) 5.	52
s. 12	Bankrupt - - -	1 Dow.& Ryl. 44 S.C. 5B.& A. 458	Bankrupt. IV. (a) 4.	51.
CHARLES II.				
13 & 14 c. 12	Poor—Settlement -	2 Dow.&Ryl. 816 S.C. 1 B.&C. 531	Poor. III. (d) 6.	206
xvi & xvii c. xii	*Itchin* Navigation Act	1 B.&C. 205. S.C. 2 Dow.&Ryl. 316	Trespass. II. 6.	256
17 c. 7 s. 2	Replevin - - -	4 Moore - 606	Replevin. II. 3. III. 5.	230 231
29 c. 3 s. 4	Frauds, Statute of -	2 Chit. - 403	Frauds, Statute of. I. (a) 1. -	142
31 c. 2	Habeas Corpus Act -	2 Chit. - 207 S.C. 3 B.& A. 420	Habeas Corpus. I. 1.	147
WILLIAM & MARY.				
1 *sess.* 1 c. 18	Toleration Act - -	1 B. & C. - 26	Blasphemy. 1. - Dissenters. 1. -	69 111
2 *sess.* 1 c. 5	Distress - - -	5 B. & A. 363	Power. III. 3. -	221
5 & 6 c. 11 s. 3	Costs—Certiorari -	5 M. & S. 520 S.C. 2 Chit. 159	Certiorari. III. 1.	75

Year of Reign.	Title and Subject.	Reporters.	This Digest.
WILLIAM III.		Vol Page.	Title. Page.
7 & 8 c. 6	Tithes	2 Dow.& Ryl. 860; S.C. 1 B.& C. 604	Certiorari. II. 2. 75; Tithes. IV. 1. 252
8 & 9 c. 11 s. 3	Costs	1 Bing. 182	Costs. I. (a) 2. 83; XIII. 6. 91; Tithes. V. 2. 253
s. 8	Bond—Suggestion of Breaches	5 Moore 198; 2 Chit. 298; 2 B. & C. 82	Bond. V. (a) 7. 71; VII. 1. 72; VII. 2. 72
c. 27 s. 12	Escape—Prisoner	4 Moore 425	Escape. I. 2. 122; Warden of the Fleet. 1. 270
9 & 10 c. 15 s. 1	Award	5 B. & A. 217	Award. II. 1. 36
c. 32	Blasphemy	1 B. & C. 26	Blasphemy. 1. 69; Dissenters. 1. 111
ANNE.			
3 & 4 c. 9.	Promissory Notes	2 Dow.& Ryl. 293; S.C. 1 B.& C. 192	Bills of Exchange. IX. (a) 9. 66
4 c. 16 s. 20	Bail Bond—Sheriff	8 Price 174	Sheriff. I. 1. 238
5 c. 14 s. 4	Game	5 B. & A. 317; 2 Dow.& Ryl. 727; S.C. 1 B.& C. 500	Game. II. (a) 145; III. (a) 1 145
7 c. 12	Ambassador's Servants	2 Dow.& Ryl. 833; S.C. 1 B.& C. 554	Distress. II. 3. 112
c. 20 s. 1	Deeds, Memorial of	5 B. & A. 142	Deed. III. 1. 97
8 c. 9	Indenture of Apprenticeship—Stamps	5 B. & A. 412	Poor. III. (c) 1. 205; Stamps. IV. 1. 246
c. 14	Distress—Rent—Execution	5 B. & A. 88	Execution. III. (c) 1. 131
s. 1	Execution	4 Moore 473	Execution. III. (d) 1. 132
9 c. 14	Gaming	2 Dow.& Ryl. 575; S.C. 1 B.& C. 444	Bankrupt VI. (a) 4. 53; Release. 2. 229
s. 1	Gaming	8 Price 281	Gaming. 2. 146
	Gaming	8 Price 281	Bills of Exchange. I. (c) 1. 63
c. 20	Quo Warranto	1 Dow.& Ryl. 438; S.C. 5 B.& A. 771	Quo Warranto. I. (a) 3. 226; (c) 1. 226
s. 5	Quo Warranto	2 Dow.& Ryl. 341; S.C. 1 B.& C. 237	Costs. XII. 3. 90
GEORGE I.			
3 c. 15	Sheriff—Poundage	6 Moore, 338 S.C. 3 Brod & Bing. 143	Sheriff. V. 3. 242
s. 8	Sheriff	2 Chit. 389	Sheriff. II. (d) 8. 241
9 c. 7 s. 5	Poor—Settlement	3 Dow. & Ryl. 16; S.C. 1 B.& C. 634	Poor. III. (c) 3. 207
c. 22 s. 7	Black Act	2 Dow.& Ryl. 439; S.C. 1 B.& C. 304	Black Act. 1. 68; Hundred. 1. 150
12 c. 34 s. 3	Clothiers—Wages	1 Dow.& Ryl. 436; S.C. 5 B.& A. 773	Certiorari. I. 6. 74; II. 3. 75
GEORGE II.			
2 c. 23	Attorney—Indorsement on Process	2 Chit. 239	Practice. V. (a) 5. 217
c. 24 s. 11	Bribery Act	1 Dow.& Ryl. 512	Bribery. 2. 72

Year of Reign.		Title and Subject.	Reporters. Vol.	Page.	This Digest. Title.	Page.
GEORGE II.—(*continued.*)						
4	c. 28	Landlord and Tenant—Double Value	5 B. & A.	363	Power. III. 3.	211
	c. 26 s. 4	Watermen—*Thames River*	2 Chit.	578	Conviction. 10.	80
5	c. 30 s. 28	Bankrupt	4 Moore	515	Guarantie. I. Set off. II. (*b*) 3.	146 236
		Set off	1 Dow. & Ryl. 530 S.C. 5. B & A. 861		Set off. II. (*b*) 2	236
11	c. 19 s. 3	Distress—Fraudulent Removal	9 Price	301	Distress. IV. 1. New Trial. II. 13. Statutes. 3.	112 189 248
	s. 4	Distress	9 Price	301	Jurisdiction I. 3.	170
	s. 19	Landlord and Tenant—Costs	1 Dow. & Ryl. 413 S.C. 5 B. & A. 796		Costs. I. (*b*) 1.	84
12	c. 26	*Goldsmiths Company's Act*	2 Chit.	139	Commitment. 1.	78
	c. 28 s. 5	Gaming	1 Dow. & Ryl. 160 S.C. 5 B. & A. 539		Sessions. IV. 1.	234
17	c. 38 s. 4	Poor—Overseer's Accounts	5 M. & S.	457	Statutes. 4.	248
22	c. 27	Silk Manufacturers Wages	1 Dow. & Ryl. 436 S.C. 5 B. & A. 773		Certiorari. I. 6. II. 3.	74 75
	c. 46 ss. 8 & 10	Attorney	5 B. & A.	538	Attorney. II. 3.	30
	s. 11	Attorney	2 Dow. & Ryl.	64	Attorney. VII. 8.	33
		Attorney	5 B. & A.	824	Attorney. VII. 9.	33
		Attorney	1 B. & C.	270	Attorney. VII. 10.	33
		Attorney	3 Dow. & Ryl.	260	Attorney. VII. 11.	33
24	c. 40 s. 12	Spirituous Liquors	5 B. & A.	241	Spirituous Liquors. 1.	215
	c. 44 s. 1	Justice of Peace—Notice of Action	2 Chit.	459	Action. IV. (*b*) 1.	4
	s. 6	Constable—Demand of Warrant	4 Moore	465	Action. VI. 1.	5
	s. 8	Constable—Demand of Warrant	5 Moore	322	Action. VI. 2. Constable. 2.	5 79
		Constable—Notice	4 Moore	465	Computation of Time 1.	251
32	c. 28	Sheriff—Extortion	5 Moore	330	Amendment. VIII. 2	14
GEORGE III.						
ii	c. lxvii.	Turnpike Act—Tolls	4 Moore	371	Tolls. I. (*b*) 1.	253
iii	c. xi.	Poor—*Bethnal Green*	2 Dow. & Ryl.	809	Poor. I. (*a*) 7.	202
4	c. 25 s. 13	Promissory Notes—Partner	2 Chit.	128	Bills of Exchange. I. (*b*) 1.	63
	c. 33. s. 1.	Bankrupt — Bond — Member of Parliament	5 B. & A.	250	Bankrupt. X. (*a*) 1. Bond. IV. 1.	58 70
5	c. 14.	Fishery—Conviction	2 Chit.	519	Conviction. 2.	79
9	c. 16.	Crown Land—Limitation of Actions	8 Price	39	Limitation of Actions. II. 2.	179
10	c. 16. s. 13	Member of Parliament—Election	1 Dow. & Ryl.	10	Perjury. 2.	199
xiii	c. liii	Poor—*Bethnal Green*	2 Dow. & Ryl.	809	Poor. I. (*a*) 7.	202
13	c. 78 s. 34	Highways	2 Dow. & Ryl. 689 S.C. 1 B. & C. 485		Highways. III. 2.	149
	s. 60	Highways—Drivers of Carts	2 Dow. & Ryl.	600	Justices of Peace. II. 5.	172
	s. 80	Highways—Certiorari	3 Dow. & Ryl.	36	Certiorari. II. 4.	75

Year of Reign.	Title and Subject.	Reporters. Vol.	Page.	This Digest. Title.	Page.
GEORGE III.—(continued.)					
13 c. 84	General Turnpike Act -	2 Chit. -	412	Tolls. I. (*b*) 2. -	254
xiv	*Kingston-upon-Hull* Dock Company - -	2 Chit. -	597	Tolls. II. 2. -	254
14 c. 56	*Hull* Dock Company -	5 M. & S.	394	Poor. II. (*b*) 3.	203
c. 78	Building Act—Party Walls - - -	5 B. & A.	1	Covenant. I. 1.	92
17 c. 26 s. 8	Annuity - - -	5 B. & A.	444	Annuity. II. (*b*) 1.	15
	Annuity - - -	5 Moore -	629	Annuity. II. (*a*) 2.	15
c. 56 s. 22	Silk Manufacturers—Wages—Certiorari—Conviction - -	1 Dow. & Ryl. S.C. 5 B. & A.	436 773	Certiorari I. 6. - II. 3. -	74 75
c. 57	Copyright - -	1 Dow. & Ryl. S.C. 5 B. & A.	400 737	Literary Property. 2. -	182
18 c. 19 s. 4	Costs—Constable . -	5 B. & A.	180	Constable. 5. -	79
c. 25 s. 5	Constable's Accounts—Appeal - - -	5 B. & A. 755 S.C. 1 Dow. & Ryl.	454	Sessions. IV. 2.	235
c. 52	Insolvent Debtors -	2 Chit. -	448	Insolvent Debtors. VI. 1. -	161
19 c. 70 s. 4	Inferior Court—Foreign Attachment - -	1 Dow. & Ryl. S.C. 5 B. & A.	537 821	Foreign Attachment. 1. -	141
22 c. 83 s. 42	Poor—Guardian of -	2 Dow. & Ryl. S.C. 1 B. & C.	184 77	Poor. I. (*a*) 4.	201
xxii c. lxxxiv	Paving Act—*St. George, Hanover Square* -	2 Chit. -	582	Paving Acts. 1.	196
xxiii c. xliv	*Birmingham* Poor—Overseers Accounts - -	2 Dow. & Ryl.	299	Poor. I. (*b*) 1. -	202
23 c. 70 s. 34	Excise Officers—Limitation of Actions -	2 Dow. & Ryl.	9	Action. V. 1. -	4
24 sess. 2. c. 47 s. 1	Excise—Smuggling -	3 Dow. & Ryl. S.C. 2 B. & C.	209 31	Conviction. 4. Smuggling. 2.	79 244
25 c. 78	Hawker and Pedlar -	2 Chit. -	522	Conviction. 5.	80
26 c. 38 s. 8	Court of Requests Act -	2 Dow. & Ryl. S.C. 1 B. & C.	241 123	Inferior Court. 1. Offices. II. (*a*) 2.	156 191
c. 60	Ships Register - -	4 Moore - S.C. 8 Price	519 256	Bankrupt. V. (*a*) 3.	51
	Ships Register	2 Dow. & Ryl. S.C. 1 B. & C.	499 327	Agreement. 5. - Ship. I. 2. -	11 242
[illegible]	Excise—Wines—Drawback—Exportation	2 Chit. -	628	Excise. 1. -	129
[illegible]	Excise—Limitation of Actions - - -	1 Bing -	167	Limitation of Actions. V. 1. -	181
29	Excise—Limitation of Actions - - -	2 Dow. & Ryl.	9	Action. V. 2. -	4
s. 24	Excise—Costs - -	1 Dow. & Ryl. S.C. 5 B. & A.	417 762	Costs. I. (*a*) 3.	83
c. 52	Member of Parliament—Election Committee	8 Price -	3	Jurisdiction. I. 4. Recognizance. 1.	170 226
30 c. 57 s. 7	Apprentice—Settlement	1 Dow. & Ryl. S.C. 5 B. & A.	421 780	Poor. III. (*c*) 2.	205
c. 58	Quo Warranto—Double Pleading - -	1 Dow. & Ryl. S.C. 5 B. & A.	438 77	Quo Warranto. I. (*c*) 1. -	226
xxxii c. lxix	*Manchester* Paving Act -	3 Dow. & Ryl. S.C. 1 B. & C.	20 630	Paving Acts. 2.	196
33 c. 54 s. 2	Friendly Society Act -	1 Dow. & Ryl. S.C. 5 B. & A. 2 Chit. -	393 769 322	Bond. IV. 2. - Friendly Society. 1.	70 145

Year of Reign.			Title and Subject.	Reporters. Vol. Page.	This Digest. Title. Page.
GEORGE III.—(continued.)					
34	c. 68		Ships Register	4 Moore - 549; S. C. 8 Price 256	Bankrupt. V. (a) 3. 51
		s. 14	Ships Register	2 Dow. & Ryl. 499; S.C. 1 B. & C. 327	Agreement. 5. - 11; Ship. I. 2. - 242
35	c. 101	s. 4	Poor Settlement	5 M. & S. 443	Poor. III. (f) 2. 207
		s. 6	Poor Removal	1 Dow. & Ryl. 384; S.C. 5 B. & A. 720	Poor. IV. (a) 1. 207
37	c. 90	s. 31	Attorney's Certificate	2 Dow. & Ryl. 238	Attorney. IV. 2. 30
39	c. 79	s. 27	Printers	5 B. & A. 335	Literary Property. 3. - 182
	c. 85		Embezzlement	1 Dow. & Ryl. N. P. C. 19	Indictment. I. (b) 1. 154
39&40	c. 99	s. 17	Pawnbrokers	1 Dow. & Ryl. 1; S.C. 5 B. & A. 439	Pawnbroker. 2. 196
	c. 104	s. 13	*London* Court of Requests	1 B. & C. 283	Costs. I. (d) 6. - 84
	c. 106	s. 4	Unlawful Agreements—Conviction	1 Dow. & Ryl. 132; S.C. 5 B. & A. 527	Conviction. 6. - 80; Sessions. II. 1. - 234
xli			*Lincoln* Drainage Act	1 Dow. & Ryl. 117; S.C. 5. B. & A. 521	Assumpsit. IV. (a) 3. 24; Taxes. II. 2. - 250
	c. 109		General Inclosure Act	2 Dow. & Ryl. 161; S.C. 1 B. & C. 70	Inclosure Acts. 6. 151
		s. 8	General Inclosure Act	9 Price - 58	Inclosure Acts. 11. 152
42	c. 85		Public Officers—Misdemeanors abroad	5 M. & S. 403	Indictment. V. 1. 154; Penal Statutes. I. (a) 199
43	c. 46	s. 2	Sheriff's Officers Fees	6 Moore - 124	Officers. II. (a) 8. 191
			Costs	2 Chit. - 147	Costs. II. (a) 4. 85
			Costs	3 Brod & Bing. 273	Costs. II. (a) 6. - 85
		s. 2	Bail to the Sheriff—Costs	2 Chit. - 71	Bail. I. (a) 3. - 40
		s. 3	Costs	1 Dow. & Ryl. 67; S.C. 5 B. & A. 513	Arrest. IV. 1. - 20; Costs. II. (a) 2. - 85
				5 B. & A. 661	Attorney. VII. 7. 33; Costs. II. (a) 3. - 85
				2 Dow. & Ryl. 266	Costs. II. (a) 5. - 85
				1 B. & C. - 91	Costs. II. (a) 7. - 85
				5 B. & A. 515 (n.)	Executors. II. (a) 5. 135
	c. 69	*Sched.* A.	Excise—Auction Duty	8 Price - 180	Auction. II. 1. - 36
	c. 84	s. 12	Non-residence	5 M. & S. 427; S. C. 2 Chit. 420	Venue. I. 1. - 269
	c. 99		Taxes—Commissioners of	1 Dow. & Ryl. 426	Mandamus. I. 7. 183; Quo Warranto. I. (b) 1. - 226
		ss. 33-8	Taxes—Collector of	3 Dow. & Ryl. 84; S.C. 1 B. & C. 666	Distress I. 3. - 111; II. 2. - 111; Jurisdiction. I. 2. 169; Taxes IV. 1. - 251
	c. 139	s. 1	Forgery—Foreign Securities	3 Brod & Bing. 201	Indictment. I. (a) 3. 154
	c. 161	ss. 10.15	Taxes—Commissioners of	8 Price - 117	Taxes. I. (a) 1. 249
44	c. 98		Stamps—Indentures of Apprenticeship	5 B. & A. 412	Poor. III. (c) 1. 205; Stamps. IV. 1. 246
			Sched. B. Post Horse Duty	2 Dow. & Ryl. 617; S.C. 1 B. & C. 319	Post Horse Duty. 2. 208
45	c. 12	s. 7	Excise—Smuggling	2 Dow. & Ryl. 212; S.C. 1 B. & C. 101	Conviction. 7. - 80
	c. 30		Auction Duties	8 Price - 180	Auction. II. 1. - 36

Year of Reign.			Title and Subject.	Reporters. Vol. Page.	This Digest. Title. Page.
GEORGE III.—(*continued*)					
45	c. 67		*Bath* Court of Requests	3 Dow.& Ryl. 51	Jurisdiction. II. 3. 170
	c. 72		Naval Prize Money -	1 Bing. - 134	Prize Money. 2 224
xlvi	c. xcvii		City Lottery Act -	1 Dow.& Ryl. 259	Lottery. 1. - 182; Trustees. 5. - 261
46	c. 97	s. 2	*Irish* Traders—Pilots -	6 Moore, 387 S.C. 3 Brod& Bing. 112	Pilots. 1. - 209
	c. 135	s. 1	Bankrupt - - -	5 Moore - 16	Bankrupt. VI. (*a*) 1. 52
47 *sess.* 2.	c. 28	s. 29	Coals - - -	5 B. & A. 27	Agent. II. 6. - 10
	c. 37		Court of Requests—Costs	5 Moore - 622	Costs. I. (*d*) 9. - 85
	c. 69		*Dover* Harbour Dues -	1 Dow.& Ryl. 274 S.C. 5 B.& A. 649	Tolls. II. 1. - 254
48	c. 51		*Rochester* Court of Requests - - -	3 Brod& Bing. 257	Costs. I. (*d*) 5. - 84
	c. 123		Insolvent Debtors -	6 Moore - 287	Insolvent Debtors. III. 4. - 160
	c. 149	s. 2	Stamps—on Legal Proceedings - - -	1 Dow.& Ryl. 562	Ejectment. III. 6. 115; Stamps. XI. 2. 248
		s. 22	Stamps—Deeds - -	3 Dow.& Ryl. 186	Deed. III. 2. - 97; Lease. III. (*b*) 2. 176
xlix	c. xxviii		Turnpike Act—Tolls -	4 Moore - 371	Tolls. I. (*b*) 1. - 254
49	c. 68	s. 3	Bastards—Justices of Peace - - -	2 Dow.& Ryl. 167 S.C. 1 B. & C. 87	Bastards. 1. - 61; Justices of Peace. IV. 2. - 172
		s. 5	Bastardy, Order of -	2 Dow.& Ryl. 426 S.C. 1 B.& C. 279	Bastards. 2. - 61; Sessions. IV. 4. 235
	c. 108		Prize Money - -	1 Bing. - 134	Prize Money. 2. 224
	c. 121	s. 2	Bankrupt - - -	4 Moore - 515	Assumpsit. VI. 2. 27; Bankrupt. VI. (*b*) 2. 53
		s. 8	Bankrupt—Sureties -	1 Dow.& Ryl. 521 S.C. 5 B.& A. 852	Assumpsit. IV. (*a*) 2. 24; Bankrupt. VIII. (*c*) 2. 57
				5 B. & A. 12	Bankrupt. VIII. (*c*) 1. 57
		ss. 8. & 14		3 Dow.& Ryl. 269	Bankrupt. VIII. (*c*) 4. 57; Bankrupt. VIII. (*b*) 3. 56
		s. 10	Bankrupt—Notice to dispute Proceedings -	6 Moore - 489	Practice. III. (*f*) 6. 216
		s. 13	Bankrupt—Examination	1 Dow.& Ryl. 377 S.C. 5 B.& A. 705	Bankrupt. IX. (*a*) 3. 58
		s. 14	Bankrupt—Creditors—Election - - -	5 B. & A. 482	Attorney. VI. 10. 32; Bankrupt. VIII. (*b*) 2. 56
				5 B. & A. - 95	Bankrupt. VIII. (*b*) 1. 56
	c. 124	s. 2	Poor—Settlement	5 B. & A. 184	Poor. IV. (*b*) 1. 208
50	c. 23		Hawker and Pedlar -	2 B. & C. 136	Hawker & Pedlar 2. 148
				2 B. & C. 142	Hawker & Pedlar 3. 148
	c. 41		Hawker and Pedlar -	2 Chit. - 213	Hawker & Pedlar 1. 148
	c. 49		Poor—Overseers Accounts	2 Dow.& Ryl. 299	Mandamus. I. 12. 183; Poor. I. (*b*) 1. - 202
		s. 1	Overseers Accounts -	1 Dow.& Ryl. 146 S.C. 5 B.& A. 535	Mandamus. I. 11. 183; Poor. I. (*b*) 2. - 202
			Overseers Accounts -	2 Chit. - 286	Poor. I. (*a*) 9. - 202
51	c. 124		Arrest—Process by Original - - -	5 Moore - 168	Arrest. V. 1. - 20
li	c. cxliii		*Liverpool* Dock Act -	5 M. & S. 328	Docks. 2. - - 113
52	c. 39	s. 2	Pilots - - -	6 Moore 387. S.C. 3 Brod& Bing. 112	Pilots. 1. - - 200
		s. 34	Pilots - - - -	5 Moore - 176	Pilots. 2. - - 200

Year of Reign.			Title and Subject.	Reporters. Vol. Page.	This Digest. Title. Page.
GEORGE III.—(*continued.*)					
52	c. 63		Embezzlement—Agent	1 Dow. & Ryl. N. P. C. - 22	Indictment. II. (*b*) 2. 154
			Embezzlement—Agent	1 Dow. & Ryl. N. P. C. - 22	Statutes. 6. - 248
lii	c. cxlv		Turnpike Act—Tolls -	2 Chit. - 655	Tolls. 1. (*b*) 4. - 254
liii	c. cxiii	s. 2	*Poor—Bethnal Green* -	2 Dow.&Ryl. 809	Poor. I. (*a*) 7. - 202
53	c. 102		Insolvent Debtors -	2 Chit. - 222	Insolvent Debtors. VI. 2 - 161
	c. 113	s. 6	Prisoners Allowance -	2 Chit. - 409	County Rate. 4. 91 Prisoner. IV. 2. 223
	c. 127		Excommunication -	3 Dow.&Ryl. 41 S.C. 1 B.&C. 655	Jurisdiction. II. 1. 170 Trustees. 2. - 261
		s. 4	Tithes - - -	2 Dow.&Ryl. 860 S.C. 1 B.&C. 604	Certiorari. II. 2. 75 Tithes. IV. 1. - 252
	c. 141		Annuities - - -	5 Moore - 479	Annuity. II. (*a*) 1. 15
			Annuities - - -	5 B. & A. 444	Annuity. II. (*b*) 2. 15
			Annuities - - -	5 Moore - 479	Annuity. II. (*d*) 2. 16
			Annuities - - -	5 Moore - 63	Annuity. II. (*d*) 3. 16
		s. 2	Annuities - - -	1 Dow.&Ryl. 374 S.C. 5 B.&A. 717	Annuity. II. (*b*) 3. 15
				3 Dow.&Ryl. 263	Annuity. II. (*d*) 4. 16
				3 Dow.&Ryl. 185 S. C. 2 B. & C. 1	Annuity. II. (*b*) 5. 16
		s. 6	Annuities - - -	1 Bing. - 77	Annuity. II. (*b*) 4. 15
	c. 160		Blasphemy - - -	1 B. & C. 26	Blasphemy. 1. - 69 Dissenters. 1. - 111
55	c. 51	s. 1	County Rate—Contribution - - -	1 Dow.&Ryl. 316 S.C. 5 B.&A. 665	County Rate. 1. 91
	c. 60		Prize Money - -	1 Bing. - 134	Prize Money. 2. 224
	c. 68		Highways - - -	5 B. & A. 424	Highways. II. 5. 149
		s. 2	Highways - - -	5 B. & A. 420	Inclosure Acts. 12. 153
			Highways - - -	2 Dow.&Ryl. 52 S.C. 1 B.&C. 21	Highways. II. 1. 148
			Highways - - -	3 Dow. & Ryl. 6 S.C. 1 B.&C. 622	Highways. II. 3. 149
	c. 137	s. 6	Parish Officers—Guardian of Poor - -	1 Dow.&Ryl. 397	Poor. I. (*a*) 6. - 201
			Parish Officers—Guardian of Poor - -	2 Dow.&Ryl. 184 S.C. 1 B.&C. 77	Poor. I. (*a*) 4. - 201 Variance. III. 13 266
			Guardian of Poor -	5 B. & A. 328	Poor. I. (*a*) 3. - 201
			Guardian of Poor -	2 Dow.&Ryl. 809	Poor. I. (*a*) 7. - 202
	c. 184	*Sched. part I.*	Stamps—Apprenticeship—Indentures - - -	5 B. & A. 412	Poor. III. (*c*) 1. 205 Stamps. IV. 1. 246
			Stamps—Bills of Exchange - - -	4 Moore - 484	Stamps. II. 2. - 245 VII. 4. - 246
			Stamps—Bills of Exchange - - -	3 Dow.&Ryl. 198 S.C. 2 B.&C. 10	Stamps. VII. 3. 246
			Stamps—Agreements -	6 Moore 226. S.C. 3 Brod.&Bing. 70	Stamps. II. 4. - 246
			Stamps—Agreements -	1 Dow.&Ryl. 433 S.C. 5 B.&A. 766	Stamps. II. 5. - 246
			Stamps—Promissory Notes	2 B. & C. 157	Stamps. VII. 6. 247
			Stamps—Deeds - -	6 Moore 188. S.C. 3 Brod.&Bing. 48	Stamps. IX. 1. 247
			Stamps—Leases - -	6 Moore 480. S.C. 3 Brod&Bing. 185	Stamps. X. 1. - 247

Year of Reign.	Title and Subject.	Reporters. Vol. Page.	This Digest. Title. Page.
GEORGE III.—(continued.)			
55 c. 184	Stamps—Leases	1 B. & C. - 18	Stamps. X. 2. - 248
c. 194	Apothecaries	1 Dow. & Ryl. 564; S.C. 5 B. & A. 949	Apothecary. 2. - 17
	Apothecaries	2 Bing. - 204	Apothecary. 3. - 18
56 c. 139	Parish Apprentice	1 Dow. & Ryl. 421; S.C. 5 B. & A. 780	Poor. III. (c) 2. 205
57 c. 19 s. 38	Hundred	3 Dow. & Ryl. 96	Hundred. 2. - 150
c. 25	Assessed Taxes	8 Price - 103	Taxes. III. (b) 1. 250
c. 57 s. 6	Smuggling—Impressment	1 Dow. & Ryl. 151	Impressment of Seamen. 1. - - 150
c. 59	Post-Horse Duty	1 Bing. - 107	Post-Horse Duty. 1. 208
c. 87 s. 5	Smuggling	2 Dow. & Ryl. 212; S.C. 1 B & C. 101	Conviction. 7. - 80
c. 99 s. 67	Spiritual Persons—Curates	2 Dow. & Ryl. 718	Clergy. 1. - - 77; Landlord and Tenant. IV. (a) 1. - 174
c. 117	Extent	8 Price - 683	Extent. II. 2. - 138
	Extent	9 Price - 311	Extent. II. 3. - 138
58 c. 59	Vestry	3 Brod & Bing. 266	Vestry. 1. - - 270
c. 70 s. 4	Costs—Witness	1 Dow. & Ryl. N. P. C. 24	Costs. VIII. 8. - 88
59 c. 12 s. 17	Churchwardens and Overseers	2 Dow. & Ryl. 708	Ejectment. IX. 1. 119
s. 33	Poor—Removal	1 Dow. & Ryl. 384; S.C. 5 B. & A. 720	Poor. IV. (a) 1. 207
c. 50	Poor—Settlement	1 Dow. & Ryl. 313	Poor. III. (d) 1. 206
c. 51	Post-Horse Duty	2 Dow. & Ryl. 625	Post-Horse Duty. 3. 208
GEORGE IV.			
1 c. 56	Malicious Trespass	1 Dow. & Ryl. 222	Justices of Peace. II. 2. - 171; IV. 3. - 172
	Justices of Peace		Trespass. II. 4. 256
c. 87	Ejectment—Landlord and Tenant	1 Dow. & Ryl. 433; S.C. 5 B. & A. 766	Ejectment. II. 6. 114
		2 Dow. & Ryl. 565	Ejectment. II. 8. 115
	Ejectment—Notice to appear	1 Dow. & Ryl. 435. n.	Ejectment. V. 1. 118
c. 88	Post-Horse Duty	2 Dow. & Ryl. 617; S.C. 1 B. & C. 319	Post-Horse Duty. 2. 208
s. 3	Post-Horse Duty	2 Dow. & Ryl. 625	Post-Horse Duty. 3. 208
c. 119 s. 25	Insolvent Debtors	5 B. & A. 759	Baron and Feme. II. (a) 10. - 61; Insolvent Debtors. III. 5. - 160
	Insolvent Debtors	8 Price - 607	Execution. V. 2. 132; Insolvent Debtors. VI. 4. - 161
1 & 2 c. 118 s. 40	Naval Stores—Thames River	1 Dow. & Ryl. 156	Justices of Peace. IV. 4. - 172
3 c. 110	Smuggling	2 Dow. & Ryl. 212; S.C. 1 B. & C. 101	Conviction. 7. - 80
4 c. 1	Annual Indemnity Act	2 B. & C. - 34	Offices. 1. - - 192; Statutes. 5. - 248

A

CHRONOLOGICAL TABLE

OF THE

GENERAL RULES AND ORDERS

CONTAINED IN THIS DIGEST.

Terms and Reigns.		Reporters. *Vol*	*Page.*	This Digest. *Title.*	*Page.*
GEORGE III.					
T. T.	29	8 Price	502	Practice. XII. (*a*) 2.	221
H. T.	38	8 Price	502	Bail. I. (*l*) 1.	45
	39	2 Chit.	376	Ejectment. IV. 1.	118
		8 Price	504		
		8 Price	503	Practice. XII. (*a*) 3.	221
				Inquiry, Writ of. 10.	158
		8 Price	504	Inquiry, Writ of. 11.	158
H. T.	40	8 Price	504	Affidavit. II. (*c*) 9.	9
		8 Price	505	Warrant of Attorney.	
M. T.	43	2 E. R.	136	I. 1.	271
		3 B. & P.	310	II. 1.	271
E. T.	45	8 Price	506	Practice. I. (*a*) 2. 3.	213
E. T.	49	8 Price	507	Practice. XII. (*d*) 2.	221
M. T.	51	8 Price	508	Bail. I. (*d*) 5.	41
M. T.	53			Practice. III. (*b*) 2.	215
M. T.	57	5 M. & S.	522	Prisoner. V. 1.	223
T. T.	59	4 Moore	2	Bail. I. (*f*) 7.	43
		8 Price	509		
(Same Rule, M. T. 60 Geo. 3.)		1 Chit.	756		
		5 Moore	472		
H. T.	60 & 1 Geo. 4.	8 Price	85	Practice. III. (*a*) 3.	214
				Practice. VII. (*c*) 7.	218
				Stamps. XI. 3.	248
GEORGE IV.					
T. T.	1	8 Price	501	Affidavit. II. (*c*) 7. 8.	9
M. T.	1	8 Price	612	Bail. I. (*b*) 4.	41
				Bail. I. (*d*) 6.	41
H. T.	1 & 2	2 Chit.	379	Ejectment. VI. 1.	118
		5 Moore	310		
		2 Brod. & Bing.	470		
		9 Price	299		
(Same Rule, M. T. 1 Geo. 4.)		2 Chit.	375		
H. T.	1 & 2	9 Price	88	Affidavit. II. (*c*) 10.	9
		9 Price	57	Bail. I. (*d*) 7.	41
		9 Price	86	Sheriff. II. (*b*) 6.	239

Terms and Reigns.	Reporters. Vol.	Page.	This Digest. Title.	Page.
GEORGE IV. *(continued.)*				
	9 Price	298	Affidavit. II. (*c*) 11.	9
E. T. 2	5 Moore 9 Price	637 299	Ejectment. IV. 2.	118
M. T. 2	5 B. & A.	217	Practice. IV. 1.	216
H. T. 2 & 3	5 B. & A. 1 Dow. & Ryl. 2 Chit.	560 471 376-7	Attorney. VI. 1. Cognovit. 1. Execution. I. (*a*) 1. King's Bench Prison. 1. Officers. II. (*a*) 1.	31 77 130 173 191
	5 B. & A. 1 Dow. & Ryl. 2 Chit.	559 196 376	Bail. I. (*e*) 1.	41
E. T. 3	5 B. & A. 1 Dow. & Ryl. 2 Chit.	799 472 377	Insolvent Debtors. III. 1. Prisoner. V. 2.	160 224
(Same Rule, M. T. 3 Geo. 4.)	1 Bing.	120		
H. T. 3 & 4	2 Dow. & Ryl. 1 B. & C.	438 288	Affidavit. II. (*b*) 1.	8
E. T. 4	2 Dow. & Ryl. 1 B. & C.	870 656	Affidavit. II. (*b*) 2.	8

TABLE

OF THE

NAMES OF THE CASES

CONTAINED IN THE PRECEDING DIGEST.

REPORTS REFERRED TO.

M. & S. - - -	Maule & Selwyn's Reports, - -	King's Bench.
B. & A. - - -	Barnewall & Alderson's Reports,	King's Bench.
B. & C. - - -	Barnewall & Cresswell's Reports,	King's Bench.
Dow. & Ryl. - -	Dowling & Ryland's Reports, -	King's Bench.
Chit. - - - -	Chitty's Reports, - - - - -	King's Bench.
Taunt. - - - -	Taunton's Reports, - - - -	Common Pleas.
Moore - - - -	Moore's Reports, - - - - -	Common Pleas.
Brod. & Bing. -	Broderip & Bingham's Reports -	Common Pleas.
Bing. - - - -	Bingham's Reports, - - - -	Common Pleas.
Price - - - -	Price's Reports, - - - - -	Exchequer Chamber.
Dow.&Ryl.N.P.C.	Dowling & Ryland's Reports, -	Nisi Prius.

N. B. The Cases printed in *Italics* are reported in Notes.

Names of Cases.	Term Reports. Vol.	Page.	This Digest. Title.	Page.
Allsop, Doe d. Robinson *v.*	5 B. & A.	142	Deed. III. 1.	97
Allworthy's Bail	2 Chit.	92	Bail. I. (*d*) 3.	41
Allwoway *v.* Hill	2 Chit.	32	Inquiry, Writ of. 3.	158
Amory *v.* Brodrick	1 Dow. & Ryl. S. C. 5 B. & A. 2 Chit.	361 712 329	Covenant. V. 1.	94
Amstead *v.* Atkins	2 Chit.	32	Annuity. III. 1.	16
Ancaster *v.* Milling	2 Dow. & Ryl.	714	Trespass. III. (*b*) 1.	257
Anderson v. *Hamilton*	8 Price S.C. 4 Moore, 2 Brod & Bing.	244, *n.* 593, *n.* 156, *n.*	Evidence. IV. (*a*) 2.	125
——— *v.* Reynolds	2 Chit.	35	Practice. II. 1.	214
Anderson's Bail	2 Chit.	104	Bail. I. (*n*) 1.	46
Andrews *v.* Bond	8 Price	538	Costs. VII. 6.	88
	8 Price	213	New Trial. II. 2. Set off. V. 1.	188 237
——— *v.* Ellison	6 Moore	199	Insurance. XIII. 1.	168
——— *v.* Sealy	8 Price	212	Costs. II. (*a*) 1. Insolvent Debtors. II. 2.	85 160
Anglesey (*Marquis*) Doe d. *v.* Brown	2 Dow. & Ryl. 3 Dow. & Ryl.	688 230	Ejectment. I. 9. II. 10.	115 115
——— *v.* Roe	2 Dow. & Ryl.	565	Ejectment. II. 8.	114
Annandale Doe d. *v.* Brazier	5 B. & A.	64	Devise. II. 5.	100
Anonymous	1 Dow. & Ryl.	127, *n.*	Bail. I. (*h*) 2.	43
Anonymous	1 Dow. & Ryl.	435, *n.*	Ejectment. V. 1.	118
Anonymous *In re*	1 Dow. & Ryl.	529	Attachment. I. 4. Attorney. VII. 14.	29 34
Anonymous	2 Dow. & Ryl. S.C. *nomine* Berry *v.* Pratt 1 B. & C.	424 276	Costs. VIII. 7.	88
Anonymous	2 Chit.	15	Affidavit. I. (*b*) 1.	7
Anonymous	2 Chit.	19	Affidavit. II. (*c*) 6.	9
Anonymous	2 Chit.	20	Affidavit. II. (*c*) 4.	9
Anonymous	2 Chit.	24	Amendment. VII. 1.	14
Anonymous	2 Chit.	34	Annuity. III. 3.	16
Anonymous	2 Chit.	36	Practice. II. 3.	214
Anonymous	2 Chit.	37	Practice. II. 4.	214
Anonymous	2 Chit.	44	Award. IV. (*a*) 17. 18.	39
Anonymous	2 Chit.	45	Award. III. (*a*) 1.	37
Anonymous	2 Chit.	62	Attorney. I. 1.	29
Anonymous	2 Chit.	66	Attorney. IX. 8.	34
Anonymous	2 Chit.	76	Bail. I. (*a*) 5. Sheriff. II. (*d*) 6.	41 241
Anonymous	2 Chit.	77	Bail. I. (*a*) 1. (*h*) 21.	40 44
Anonymous	2 Chit.	81	Bail. I. (*e*) 11.	42
Anonymous	2 Chit.	82	Bail. I. (*f*) 4.	43
Anonymous	2 Chit.	84	Bail. I. (*e*) 3.	42
Anonymous	2 Chit.	86	Bail. I. (*e*) 4. 10. (*h*) 26.	42 44
Anonymous	2 Chit.	87	Bail. I. (*e*) 7. (*h*) 27.	42 44
Anonymous	2 Chit.	88	Bail. I (*f*) 1.	42
Anonymous	2 Chit.	89	Bail. I. (*f*) 3.	42
Anonymous	2 Chit.	91	Bail. I. (*b*) 2.	41
Anonymous	2 Chit.	92	Bail. I. (*d*) 4.	41

Names of Cases.	Term Reports. Vol.	Page.	This Digest. Title.	Page.
Anonymous	2 Chit.	94	Bail. I. (*h*) 11.	44
Anonymous	2 Chit.	96	Bail. I. (*h*) 5. 6.	44
Anonymous	2 Chit.	97	Bail. I. (*h*) 7.	44
Anonymous	2 Chit.	98	Bail. I. (*h*) 15.	44
Anonymous	2 Chit.	103	Bail. I. (*h*) 19. II. 8.	44 47
Anonymous	2 Chit.	137	Certiorari. I. 2.	74
Anonymous	2 Chit.	150	Costs. IX. 4.	89
Anonymous	2 Chit.	152	Costs. IX. 10.	89
Anonymous	2 Chit.	155	Attorney. IX. 1.	34
Anonymous	2 Chit.	157	Costs. IX. 5.	89
Anonymous	2 Chit.	165	Practice. VI. (*g*) 2.	220
Anonymous	2 Chit.	171	Ejectment. V. 5.	118
Anonymous	2 Chit.	172	Ejectment. III. 1.	115
Anonymous	2 Chit.	173	Ejectment. III. 2. 3. 4. V. 8.	115 118
Anonymous	2 Chit.	176	Ejectment. III. 9.	116
Anonymous	2 Chit.	177	Ejectment. III. 26.	117
Anonymous	2 Chit.	179	Ejectment. III. 29.	117
Anonymous	2 Chit.	181	Ejectment. III. 21.	116
Anonymous	2 Chit.	182	Ejectment. III. 13. 36.	116-17
Anonymous	2 Chit.	184	Ejectment. III. 30.	117
Anonymous	2 Chit.	185	Ejectment. III. 32.	117
Anonymous	2 Chit.	186	Ejectment. III. 34.	117
Anonymous	2 Chit.	187	Ejectment. III. 35-7.	117
Anonymous	2 Chit.	188	Ejectment. VII. 1.	119
Anonymous	2 Chit.	189	Ejectment. VII. 3.	119
Anonymous	2 Chit.	190	Ejectment. VII. 4.	119
Anonymous	2 Chit.	191	Error. II. 6.	120
Anonymous	2 Chit.	194	Evidence. IV. (*a*) 3.	125
Anonymous	2 Chit.	199	Witness. V. 3. 4.	276
Anonymous	2 Chit.	200	Costs. VIII. 6.	88
Anonymous	2 Chit.	204	Sheriff. II. (*b*) 5.	239
Anonymous	2 Chit.	225	Insolvent Debtors. IV. 1.	161
Anonymous	2 Chit.	230	Inspection of Deeds. 2.	162
Anonymous	2 Chit.	237	Practice. V. (*a*) 3.	217
Anonymous	2 Chit.	238	Practice. VI. (*b*) 3.	218
Anonymous	2 Chit.	239	Practice. III. (*d*) 4. VI. (*b*) 4. (*c*) 2.	215 218 218
Anonymous	2 Chit.	240	Error. IV. (*b*) 3. Execution. V. 3.	121 133
Anonymous	2 Chit.	241	Practice. XI. 1. XII. (*b*) 4.	221 221
Anonymous	2 Chit.	251	Mandamus. I. 8.	183
Anonymous	2 Chit.	253	Mandamus. II. 9.	184
Anonymous	2 Chit.	254	Mandamus. I. 9. 10. III. 1.	183 185
Anonymous	2 Chit.	255	Mandamus. II. 10, 11.	184
Anonymous	2 Chit.	257	Mandamus. I. 13.	183
Anonymous	2 Chit.	264	Inquiry, Writ of. 2.	158
Anonymous	2 Chit.	266	Practice. IV. 3.	216
Anonymous	2 Chit.	290	Inspection of Deeds. 7.	162

B.

C.

D.

Names of Cases.	Term Reports. Vol.	Page.	This Digest. Title.	Page.
Darley v. Brown	8 Price	607	Execution. V. 2. Insolvent Debtors. VI. 4.	132 161
Dartnall v. Howard	2 Chit.	28	Amendment. III. 1.	13
——— v. Wellesley (*Marquis*)	3 Brod. & Bing.	255	Annuity. III. 2.	16
Darwin v. Lincoln	5 B. & A.	444	Annuity. II. (b) 1. 2.	15
Davenport v. Carter	5 Moore	16	Bankrupt. VI. (a) 1	52
Davey v. Prendergrass	5 B. & A. S. C. 2 Chit.	187 336	Bond. II. 3. V. (a) 5.	69 71
Davidson v. Case (*in error*)	5 Moore S. C. 8 Price	116 542	Insurance. VII. (b) 1.	166
Davies, Doe d. v. Roe	1 B. & C. 118. S. C. 2 Dow. & Ryl.	229	Ejectment. VII. 5.	119
——— v. Lewis	2 Chit.	535	Evidence. V. (a) 2.	127
Davis, Doe d. v. Williams	2 Dow. & Ryl. S. C. *nomine* Doe d. Davis v. Roe 1 B. & C.	229 118	Ejectment. VIII. 2.	119
—— v. Fowler	2 Chit.	74	Bail. I. (m) 4.	45
—— v. Nichols	2 Chit.	320	Assumpsit. III. 1.	23
—— v. Norton	1 Bing.	133	Execution. III. (a) 1.	131
—— v. Saunders	2 Chit.	639	Trespass. II. 1.	256
—— v. Taylor	2 Chit.	268	New Trial. III. 13.	190
Davison v. Mekibben	6 Moore 387. S. C. 3 Brod. & Bing.	112	Pilots. 1.	200
Dawes v. Benn	3 Dow. & Ryl. S. C. 1 B. & C.	122 751	Tithes. I. 2. 3.	252
Dawson v. Linton	1 Dow. & Ryl. S. C. 5 B. & A.	117 521	Assumpsit. IV. (a) 3. Taxes. II. 2.	24 250
——— v. Sampson	2 Chit.	146	Costs. X. 2.	89-90
Day v. Mearns	2 Chit.	156	Award. IV. (d) 4. Costs. I. (d) 7.	40 84
Deacon, *Ex parte*	5 B. & A.	759	Baron and Feme. II. (a) 10. Insolvent Debtors. III. 5.	61 160
Deare v. Edmunds	2 Chit.	301	Distress. III. (b) 1.	112
Delane v. Mott	2 Chit.	423	Warrant of Attorney. II. 6.	271
De Montellano (*Duke*) v. Christin	5 M. & S.	503	Costs. IX. 8.	89
Denn d. Geering v. Shenton	2 Chit.	662	Devise. III. 12.	104
—— v. Taylor	2 Chit.	681	Devise. III. 4.	102
Derby (*Mayor*) v. Wheeldon	9 Price	150	Practice. III. (a) 4.	214-15
De Tastet v. Rucker (*in error*)	6 Moore, 135. S. C. 3 Brod. & Bing.	65	Amendment. VI. 3. Error. I. 2. Misnomer. 2.	14 120 186
—— Woolf v. ———	2 Chit.	14 68	Affidavit. II. (c) 1. Stamps. I. 2. Attorney. VII. 1.	8 245 32
Dicas v. Perry	2 Dow. & Ryl.	869	Scire Facias. II. 2.	233
Dillon v. Doe d. Parker (*in error*)	1 Bing.	17	Bill of Exceptions. 2. Error. IV. (a) 4.	62 121
——— v. Rimmer	1 Bing.	100	Costs. I. (d) 8.	84
Dimsdale v. Eames	4 Moore	350	Bankrupt. X. (a) 2.	58
Dixon v. Broomfield	2 Chit.	205	Frauds, Statute of. 4.	142

H.

Names of Cases.	Term Reports. Vol.	Page.	This Digest. Title.	Page.
Johnson v. Garnett	2 Chit.	122	Bills of Exchange. I. (d) 2.	63
—— v. Gibb	2 Chit.	123	Bills of Exchange. I. (d) 3.	63
—— v. Linsey	2 Dow. & Ryl. S. C. 1 B. & C.	385 247	Bail. I. (n) 3. Scire Facias. II. 3.	46 233
Jones v. Bird	1 Dow. & Ryl. S. C. 5 B. & A.	497 837	Action. IV. (a) 1. Action on the Case. II. (b) 1. Sewers. 3.	4 6 237
—— v. Davies	1 B. & C.	143	Certiorari. III. 3.	75
——, Doe d. v. Jones	2 Dow. & Ryl. S. C. 1 B. & C.	373 238	Discontinuance. I. 1.	110
——, *Ex parte*	4 Moore	347	Attorney. III. 1.	30
—— v. Jones	1 Bing. 1 Dow. & Ryl.	249 558	Costs. III. 1. Executors. IV. (a) 5. Warrant of Attorney. II. 2.	85 136 271
—— v. Osborne	2 Chit.	484	Innkeeper. 1.	157
—— v. Owen	2 Dow. & Ryl.	600	Justices of Peace. II. 5. Trespass. I. 4.	172 255
—— v. Tatham	8 Taunt.	634	Variance. IV. 4.	267
—— v. Thorne	3 Dow. & Ryl. S. C. 1 B. & C.	152 715	Covenant. III. 3.	93
—— v. Woollam	1 Dow. & Ryl. S. C. 5 B. & A. 2 Chit.	393 769 322	Bond. IV. 2. Friendly Society. 1.	70 145

K.

Names of Cases.	Term Reports. Vol.	Page.	This Digest. Title.	Page.
Kaye, *In re*	1 Dow. & Ryl. S. C. *nomine* Rex v. Rogers, 5 B. & A.	436 773	Certiorari. I. 6. II. 3.	74 75
Keats v. Hick	5 Moore	629	Annuity. II. (a) 2.	15
Kelly v. Clubbe	6 Moore, 335. S. C. 3 Brod. & Bing.	130	Annuity. I. 2. Debt. I. 2.	15 97
—— v. Wrother	2 Chit.	109	Affidavit. II. (a) 1. Bail. I. (e) 9. II. 1.	8 42 46
Kemp v. Neville	5 Moore	21	Arrest. VII. 4. Bankrupt. X. (a) 7.	21 59
Kent v. Monk	2 Chit.	295	Practice. III. (f) 3.	216
Ker v. Mitchell	2 Chit.	487	Bond. IV. 4.	70
Kerr v. Dick	2 Chit.	11	Practice. VI. (b) 1.	217
Kesterton v. Sabery	2 Chit.	541	Insolvent Debtors. I. 2.	159
Key v. Browne	3 Dow. & Ryl. S. C. 1 B. & C.	28 653	Practice. III. (a) 1.	214
Kilsby v. Williams	1 Dow. & Ryl. S. C. 5 B. & A.	476 815	Assumpsit. V. (c) 6. Payment. 2.	26 197
Kine v. Beaumont	3 Brod. & Bing.	288	Bills of Exchange. IX. (c) 1. Evidence. IV. (a) 6.	67 125
King v. Gough	2 Chit.	655	Tolls. I. (b) 4.	254

N.

O.

Names of Cases.	Term Reports. Vol.	Page.	This Digest. Title.	Page.
Rex *v.* Lewis	9 Price	142	Insolvent Debtors. III. 6, 7, 8.	160
—— *v.* Lincombe	2 Chit.	214	Highways. IV. 1.	149
—— *v.* London (*Bishop*)	1 Dow. & Ryl.	486	Execution. IV. 1.	132
—— *v.* London (Assurance Company)	1 Dow. & Ryl. S. C. 5 B. & A.	510 899	Mandamus. II. 5.	184
—— *v.* London (*Sheriff*)	1 Dow. & Ryl. 2 Chit.	163 58	Sheriff. II. (*d*) 1. Sheriff. II. (*d*) 3.	240 240
—— *v.* M'Gill	2 B. & C.	142	Hawker. 3.	148
—— *v.* Manchester (*Justices*)	1 Dow. & Ryl. S. C. *nomine* Rex *v.* Lancashire (*Justices*) 5 B. & A.	454 755	Mandamus. II. 16. Sessions. IV. 2.	184 235
—— *v.* —————— Water Works (Company)	3 Dow. & Ryl. S. C. 1 B. & C.	20 630	Paving Acts. 1.	196
—— *v.* *Manor of Havering-Atte-Bower (Steward)*	2 Dow. & Ryl. S. C. 5 B. & A.	176, *n.* 691	Mandamus. I. 2.	182
—— *v.* Margate Harbour (Company)	2 Chit.	256	Mandamus. I. 14.	183
—— *v.* Marriott	1 Dow. & Ryl.	166	Amendment. I. 9. Mandamus. IV. 1.	12 185
—— *v.* Marshall	2 Chit.	370	Quo Warranto. I. (*a*) 5. (*c*) 2.	226 226
—— *v.* Mason	1 Dow. & Ryl. N. P. C.	22	Indictment. I. (*b*) 2. Statutes. 6.	154 248
—— *v.* Meer and Forton (*Mayor and Steward*)	2 Dow. & Ryl. S. C. *nomine* Rex *v.* Boughey 1 B. & C.	824 565	Mandamus. IV. 3.	185
—— *v.* Middlesex (*Sheriff*)	2 Chit. 5 B. & A. 1 Dow. & Ryl. 2 Dow. & Ryl.	99 357 746 388 225	Bail. I. (*k*) 3. Sheriff. II. (*d*) 9. (*a*) 1. (*d*) 7. IV. 1. II. (*d*) 11.	45 241 238 241 241 241
—— *v.* Morgan	2 Chit.	563	Game. III. (*a*) 2.	145
—— *v.* Norfolk (*Justices*)	1 Dow. & Ryl. S. C. 5 B. & A.	69 484	Justices of Peace. II. 1. Mandamus. II. 17. Poor. IV. (*b*) 2.	171 185 208
—— *v.* North Collingham (*Inhab.*)	2 Dow. & Ryl. S. C. 1 B. & C.	743 578	Poor. III. (*d*) 3.	206
—— *v.* Northwold (*Inhab.*)	2 Dow. & Ryl.	790	Poor. III. (*b*) 1.	204
—— *v.* Norwich (*Justices*)	3 Dow. & Ryl.	42	Poor. II. (*c*) 3.	204
—— *v.* Oakmere (*Inhab.*)	1 Dow. & Ryl. S. C. 5 B. & A.	427 775	Poor. IV. (*a*) 2.	207
—— *v.* Oxfordshire (*Justices*)	1 B. & C. S. C. *nomine* Rex *v.* Gloucestershire (*Justices*) 2 Dow. & Ryl.	279 42[illegible]	Bastards. 2. Sessions. IV. 4.	61 235
—— *v.* Palmer	2 Dow. & Ryl. S. C. 1 B. & C.	793 546	Poor. II. (*b*) 5.	203
—— *v.* Pancras (S.) (*Inhab.*)	2 B. & C.	122	Poor. III. (*f*) 1.	207
—— *v.* Payne	2 Chit.	367	Quo Warranto. I. (*a*) 1. (*b*) 4.	225 226

Names of Cases.	Term Reports. Vol. Page.	This Digest. Title. Page.
Rex *v.* Penegoes (*Inhab.*) - -	2 Dow. & Ryl. 209 S. C. 1 B. & C. 142	Certiorari. I. 10. - 75
—— *v.* Penryn (*Inhab.*) - -	5 M. & S. - 443	Poor. III. (*f*) 2. 207
—— *v.* Portmore (*Earl*) - -	2 Dow. & Ryl. 798 S. C. 1 B. & C. 551	Poor. II. (*b*) 6. - 203
—— *v.* Poynder - - - -	2 Dow. & Ryl. 258 S. C. 1 B. & C. 178	Indictment. V. 2. 155 Poor. I. (*a*) 1. - 201
—— *v.* Ridgway - - - -	1 Dow. & Ryl. 132 S. C. 5 A. & B. 527 1 Dow. & Ryl. 132 S. C. (not S. P.) 5 B. & A. - 527	Conviction. 6. - 80 Sessions. II. 1. - 234 Conviction. 12. - 86
—— *v.* Rogers - - - -	1 Dow. & Ryl. 156 5 B. & B. 773. S. C. *nomine In re* Kaye, 1 Dow. & Ryl. 436	Justices of Peace. IV. 4. - 172 Certiorari. I. 6. - 74 II. 3. - 75
—— *v.* Rogier - - - -	2 Dow. & Ryl. 431 S. C. 1 B. & C. 272	Gaming. 1. - - 145 Indictment. VII. 1. 155
—— *v.* Rotherfield Greys (*Inhab.*)	2 Dow. & Ryl. 628 S. C. 1 B. & C. 345	Poor. III. (*a*) 3. - 204
—— *v.* Sadler - - - - -	2 Chit. - - 519	Conviction. 1, 2. - 79
—— *v.* St. Austell (*Inhab.*) - -	1 Dow. & Ryl. 351 S. C. 5 B. & A. 693	Poor. II. (*b*) 1. - 203
—— *v.* St. Pancras (*Inhab.*) - -	2 B. & C. - 122	Poor. III. (*f*) 1. - 207
—— *v.* Salter - - - - -	2 Chit. - - 109	Bail. III. 3. - - 48
—— *v.* Selway - - - - -	2 Chit. - - 522	Conviction. 5. 9. - 80
—— *v.* Seton - - - - -	8 Price - - 671	Arrest. VII. 7. - 21 Extent. I. 6. - - 137
—— *v.* Seville - - - - -	5 B. & A. - 180	Constable. 5. - - 79
—— *v.* Shawe - - - - -	5 M. & S. - 403	Indictment. V. 1. 154 Penal Statutes. I. (*a*) 1. 199
—— *v.* Smallpiece - - -	2 Chit. - - 288	Inspection of Deeds. 8. - 162 Mandamus. II. 18. 185
—— *v.* Smith - - - - -	2 Chit. - - 398	Practice. X. 3. - 220
—— *v.* Somersetshire (*Justices*) -	1 Dow. & Ryl. 443	Certiorari. I. 8. - 75 Justices of Peace. V. (*a*) 2. - 173
—— *v.* Southampton (*Inhab.*) -	2 Chit. - - 215	Bridges. 1. - - 72
—— *v.* Sudbury (*Mayor, &c.*) -	2 Dow. & Ryl. 651 S. C. 1 B. & C. 389	Poor. II. (*b*) 2. - 203
—— *v.* Surrey (*Justices*) - -	1 Dow. & Ryl. 160 S. C. 5 B. & A. 539	Sessions. IV. 1. - 234
—— *v.* Sutton St. Edmunds (*Inhab.*)	2 Dow. & Ryl. 800 S. C. 1 B. & C. 536	Poor. III. (*d*) 5. - 206
—— *v.* Taylor - - - - -	2 Chit. - - 578	Conviction. 10. - 80
—— *v.* Thatcher - - - -	1 Dow & Ryl. 426	Mandamus. I. 7. 183 Quo Warranto. I. (*b*) 1. - 226
—— *v.* Townsend - - - -	5 B. & A. - 420	Inclosure Acts. 11. 153
—— *v.* Travannion - - - -	2 Chit. - - 366	Mandamus. I. 15. 183 Quo Warranto. I. (*a*) 6. - 226
—— *v.* Trent and Mersey (Canal Company) - - -	2 Dow. & Ryl. 752 S. C. 1 B. & C. 545	Poor. II. (*b*) 4. - 203

S.

Names of Cases.	Term Reports. Vol.	Term Reports. Page.	This Digest. Title.	This Digest. Page.
T.				
Talmash (*Bart.*) *v.* Gardiner	1 Dow. & Ryl.	512	Bribery. 2.	72
Tamm *v.* Williams	2 Chit.	438	Foreign Attachment. 3.	141
Tankerville (*Lord*) *v. Wingfield*	5 Moore	346, *n.*	Power. III. 2.	210
Tapley *v.* Battine	1 Dow. & Ryl.	79	Arrest. II. 2.	19
Tatham, *Demandant;* Baxendale, *Tenant;* Tabor, *Vouchee*	4 Moore	481	Recovery. II. 1.	227
Taylor *v.* Hipkins	5 B. & A.	489	Limitation of Actions. IV. (*a*) 1.	181
——— *v.* Hunt	2 Chit.	142	Action. I. 1. Partners. I. 2.	2 193
——— *In re*	5 B. & A.	217 538	Award. II. 1. Attorney. II. 3.	36 29
——— *v.* Pill (*in error*)	8 Taunt. S. C. 11 East	805 414	Prize-Money. 1.	224
——— *v.* Riley	9 Price	385	Practice. I. (*a*) 4.	213
——— *v.* Rutherman	6 Moore	264	Arrest. VII. 13.	22
——— *v.* Waters	2 Chit.	303	Set-off. IV. 6.	237
——— *v.* Whittaker	2 Dow. & Ryl.	225	Baron and Feme. II. (*a*) 5.	60
Teall *v.* Auty	4 Moore	542	Assumpsit. VII. 1. Frauds, Statute of. I. (*b*) 1.	28 142
Tennyson, Doe d. *v.* Yarborough (*Lord*)	1 Bing.	24	Lease II. 2.	175
Teverell, Doe d. *v.* Snee	2 Dow. & Ryl.	5	Ejectment. III. 15.	116
Thacker *v.* Shepherd	2 Chit.	652	Action. I. 3. Partners. IV. 3. V. 1.	3 195 195
Thomas, Doe d. *v.* Roe	2 Chit.	171	Ejectment. V. 4.	118
Thompson *v.* Beatson	1 Bing.	145	Bankrupt. VII. (*a*) 3.	55
——— Doe d. *v.* Roe	2 Chit.	186	Ejectment. III. 33.	117
Thompson's Bail	2 Chit.	87	Bail. I. (*f*) 5.	43
Thomson *v.* Adam	5 Moore	280	Bills of Lading. 1. Freight. 2.	68 144
——— *v.* Austen	2 Dow. & Ryl,	358	Evidence. VIII. (*a*) 1. Set-Off. IV. 7. Witness. II. (*a*) 4.	128 237 274
Thornton *v.* Skerratt	8 Taunt.	529	Agreement. 4. Insolvent Debtors. I. 4.	11 159
Threlfall *v.* Webster	1 Bing.	161	Inspection of Deeds. 10.	163
Thwaites, Doe d. *v.* Roe	3 Dow. & Ryl.	226	Attorney. VI. 9.	31
Times, *Demandant;* Meredith, *Tenant;* Edwards, *Vouchee*	5 Moore	474	Recovery. IV. 10.	228
Tindale, Doe d. *v.* Roe	2 Chit.	180	Ejectment. III. 25.	117
Tolson *v.* Kaye	6 Moore, 542. S. C. 3 Brod. & Bing.	217	Limitation of Actions. I. 1.	179
Tomkinson's Bail	2 Chit.	94	Bail. I. (*c*) 6.	41
Tomlinson *v.* Day	5 Moore	558	Use and Occupation. 3.	262
——— *v.* Harvey	2 Chit.	83	Bail. I. (*g*) 3.	43

Names of Cases.	Term Reports. Vol.	Page.	This Digest. Title.	Page.
Williams, Doe d. *v.* Richardson	8 Taunt.	697	Award. IV. (*a*) 15.	38
———, *Ex parte*	8 Price	3	Jurisdiction. I. 4. Recognizance. 1.	170 226
——— *v.* Hockin	8 Taunt.	435	Affidavit. II. (*b*) 3. Annuity. III. 6.	8 17
——— *v.* Pratt	5 B. & A.	896	Amendment. III. 4. New Trial. II. 3.	13 188
——— *v.* Reeves	2 Chit.	218	Inquisition. 1.	158
——— *v.* Sawyer	6 Moore, 226. S.C. 3 Brod. & Bing.	70	Stamps. II. 4.	245
——— *v.* Taylor	5 Moore	472	Bail. I. (*f*) 8.	43
——— *v.* Wynne	9 Price	344	Costs. XIII. 4.	91
Williamson *v.* Goold	1 Bing.	171 234	Annuity. III. 7. 9.	17 17
——— *v.* Johnson	2 Dow. & Ryl. S. C. 1 B. & C.	281 146	Bills of Exchange. IX. (*c*) 3. Partners. II. 1.	68 194
Willis *v.* Ward	2 Chit.	297	Common. 1.	78
Wilmot, *Plaintiff;* Clarke, *Deforciant*	8 Taunt.	335	Fine of Lands. III. 3.	140
Wilson *v.* Caupland	5 B. & A.	228	Assumpsit. V. (*c*) 4.	25
—— Doe d. Shrewsbury (*Earl*) *v.*	5 B. & A.	363	Power. III. 3.	210
—— *v.* Girdlestone	1 Dow. & Ryl. S. C. 5 B. & A.	488 847	Evidence. VI. (*a*) 1. Trespass. III. 1.	127 260
—— *v.* Kingston	2 Chit.	203	Execution. II. (*a*) 1.	131
—— *v.* Peto	6 Moore	47	Action. I. 5.	3
—— *v.* Stafford	2 Chit.	355	Practice. I. (*d*) 1. Variance. I. 1.	214 263
—— *v.* Tucker	1 Dow. & Ryl. N. P. C.	30	Attorney. VI. 3. Executors. II. 4.	31 135
Winsor *v.* Pratt	5 Moore	484	Frauds, Statute of. II. 1. Will. 1.	144 273
Winn *v.* Ingilby, *Bart.*	5 B. & A. S. C. *nomine* Wynne *v.* Ingleby 1 Dow. & Ryl.	625 247	Execution. III. (*b*) 1. Fixtures. 3.	131 141
Winstone *v.* Linn	1 B. & C. 460. S. C. 2 Dow. & Ryl.	465	Apprentice. 2.	18
Witte *v.* Hague	2 Dow. & Ryl.	33	Action on the Case. II. (*b*) 2.	6
Wood, *Demandant;* Aldersey, *Tenant*	1 Bing.	212	Recovery. III. 2.	227
—— *v.* Perrott	5 Moore	63	Annuity. II. (*d*) 3.	16
—— *v.* Veal	1 Dow. & Ryl. S. C. 5 B. & A.	20 454	Highways. I. 2.	148
Woodrooffe *v.* Oldfield	1 Dow. & Ryl.	7	Bail. I. (*e*) 2.	42
Woods *v.* Russell	1 Dow. & Ryl. S. C. 5 B. & A.	587 942	Bankrupt. V. (*a*) 4. VI. (*b*) 9.	51 54
Woolley *v.* Clark	2 Dow. & Ryl. S. C. *nomine* Woolley *v.* Kelly 1 B. & C.	158 68	Award. II. 4. Execution. I. (*a*) 3.	37 1[illegible]
	1 Dow. & Ryl. S. C. 5 B. & A.	409 744	Executors. I. 2.	138
Worthington, Doe d. *v.* Butcher	2 Chit.	174	Ejectment. III. 5.	115
Worton *v.* Smith	6 Moore	110	Particulars [illegible] Residence. 1.	1[illegible]

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